No. 90-34-CFX
Status: GRANTED

Title: Exxon Corporation, Petitioner
v.
Central Gulf Lines, Inc., et al.

Docketed:
July 3, 1990

Court: United States Court of Appeals
for the Second Circuit

Counsel for petitioner: Pare Jr.,Armand Maurice

Counsel for respondent: Montbach,Francis A.

Entry	Date	Note	Proceedings and Orders
1	Jul 3 1990	G	Petition for writ of certiorari filed.
2	Aug 2 1990		Brief of respondents Central Gulf Lines, Inc., et al. in opposition filed.
3	Aug 8 1990		DISTRIBUTED. September 24, 1990
4	Oct 1 1990	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
5	Dec 17 1990		Brief amicus curiae of United States filed.
7	Dec 19 1990		REDISTRIBUTED. January 11, 1991
8	Jan 14 1991		Petition GRANTED.
			**********
9	Feb 27 1991		SET FOR ARGUMENT MONDAY, APRIL 15, 1991. (4TH CASE)
10	Feb 27 1991		Brief amicus curiae of United States filed.
11	Feb 28 1991		Joint appendix filed.
12	Feb 28 1991		Brief of petitioner Exxon Corporation filed.
13	Mar 6 1991	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
14	Mar 13 1991		Record filed.
		*	Certified copy of C. A. Proceedings received.
15	Mar 18 1991		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
16	Mar 22 1991		CIRCULATED.
17	Apr 1 1991	X	Brief of respondents Central Gulf Lines, Inc., et al. filed.
18	Apr 8 1991	X	Reply brief of petitioner Exxon Corporation filed.
19	Apr 15 1991		ARGUED.

90-34

No. _____

Supreme Court, U.S.
FILED
JUL 3 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

EXXON CORPORATION,

Petitioner,

—v.—

CENTRAL GULF LINES, INC., *in personam*, and the M/V GREEN HARBOUR (ex WILLIAM HOOPER), *in rem*, her engines, boilers, tackle, etc. and a certain Letter of Credit No. P 621208 dated December 26, 1984 issued by the Chase Manhattan Bank, N.A., *in rem*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ARMAND MAURICE PARÉ, JR.
Counsel of Record

BRADLEY F. GANDRUP, JR.

NOURSE & BOWLES
Counsel for Petitioner
One Exchange Plaza
At 55 Broadway
New York, New York 10006
(212) 952-6200

July 3, 1990

QUESTIONS PRESENTED

1. Should this Court resolve the direct conflict among the Second, Fifth, Ninth and Eleventh Circuits and establish a uniform rule concerning whether admiralty jurisdiction exists on claims by agents who procure necessary marine services and/or supplies for vessels in the maritime commerce of the United States?

2. Should this Court overrule, or at least limit, its much criticized one page opinion in *Minturn v. Maynard*, 58 U.S. (17 How.) 477 (1855), which refused to recognize admiralty jurisdiction on a suit involving an agency contract calling for necessary marine services and supplies to be delivered to a vessel in the maritime commerce of the United States?

LIST OF PARTIES

The parties to the proceedings below are those set forth in the caption. The following statement is provided in accordance with Rule 29.1 of the Rules of the Supreme Court of the United States.

Petitioner Exxon Corporation has no corporate parent. The subsidiaries which it directly or indirectly owns by less than one hundred per cent are listed in Appendix D. (A-36).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

EXXON CORPORATION,

Petitioner,

—v.—

CENTRAL GULF LINES, INC., *in personam*, and the M/V GREEN HARBOUR (ex WILLIAM HOOPER), *in rem*, her engines, boilers, tackle, etc. and a certain Letter of Credit No. P 621208 dated December 26, 1984 issued by the Chase Manhattan Bank, N.A., *in rem*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Exxon Corporation, respectfully prays that a writ of certiorari be issued to review a portion of the Summary Order of the United States Court of Appeals for the Second Circuit, entered in these proceedings on April 5, 1990.

OPINIONS BELOW

The Summary Order of the United States Court of Appeals for the Second Circuit was not reported but is reprinted in the Appendix hereto as Appendix A.

The opinions of the United States District Court for the Southern District of New York are reported at 717 F. Supp.

1029 and 707 F. Supp. 155 and are reprinted in the Appendix hereto as Appendices B and C, respectively.

JURISDICTION

The Order of the Court of Appeals was entered on April 5, 1990 affirming the judgment below. This Petition for a Writ of Certiorari was filed within ninety days of that date.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Article III, Section 2, Clause 1, provides that:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; —to all Cases affecting Ambassadors, other public ministers and Consuls; —to all Cases of admiralty and maritime Jurisdiction; —to Controversies to which the United States shall be a Party; —to Controversies between two or more States; —between a State and Citizens of another State, —between Citizens of different States, —between Citizens of the same State claiming Lands under Grants of different States, and between a State, the Citizens thereof, and foreign States, Citizens or Subjects.

The Judicial Code, 28 U.S.C. § 1333 (1949) (corresponds to The Judiciary Act of 1789, Section 9, 1 Stat. 76-77), provides that:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.
>
> (2) Any prize brought into the United States and in all proceedings for the condemnation of property taken as prize.

STATEMENT OF THE CASE

I. The Facts

Respondent Central Gulf Lines, Inc. ("Central Gulf") was the owner of the United States flag cargo vessel M/V GREEN HARBOUR (ex WILLIAM HOOPER) (the "Vessel"). Central Gulf bareboat chartered the Vessel to Waterman Steamship Corporation ("Waterman") for use in Waterman's United States flag commercial liner service between ports in the United States and the Middle East, including Saudi Arabia.

Exxon Corporation ("Exxon") was the supplier to Waterman of marine fuels for many years. Under its supply contract with Waterman, Exxon provided marine fuel either itself or through local supplying companies.

Exxon agreed with Waterman to effect supplies of fuel to the Vessel, on credit, at both Jeddah, Saudi Arabia and the Port of New York. Exxon directly supplied the fuel to the Vessel at New York on October 7, 1983. At Jeddah, Exxon ordered the fuel from a local supplier, which delivered it to the Vessel on October 26, 1983. Respecting the Jeddah delivery, Exxon was invoiced by the local supplier and Exxon paid the invoice. Exxon invoiced Waterman for both deliveries but Exxon was not paid by Waterman.

II. The Proceedings Below

Exxon commenced this litigation to enforce Exxon's maritime lien claims against the Vessel. Exxon brought suit under both the General Maritime Law and the United States Maritime Lien Act, 46 U.S.C.A. §§ 31305-31307, 31341-31342. Exxon moved for summary judgment arguing that United

States law applied and that it was entitled to judgment as a matter of law. Central Gulf cross-moved for summary judgment.

In an opinion and order dated March 3, 1989 (A-22), the district court agreed that United States law applied. The court held that Exxon's claim for the New York delivery was within admiralty jurisdiction and granted judgment in favor of Exxon. The court concluded, however, that Exxon acted as an agent with respect to the fuel delivered at Jeddah. The court held that because Exxon acted as an agent, Exxon's claim for the Jeddah delivery was outside admiralty jurisdiction and dismissed its claim relying on the Second Circuit's decision in *Peralta Shipping Corp. v. Smith & Johnson (Shipping) Corp.*, 739 F.2d 798 (2d Cir. 1984), *cert. denied*, 470 U.S. 1031 (1985) and this Court's decision in *Minturn v. Maynard*, 58 U.S. (17 How.) 477 (1855).

Exxon moved for reconsideration by the district court, arguing, *inter alia*, that Exxon was a seller to Waterman rather than Waterman's agent. In an opinion and order dated July 21, 1989 (A-3), the district court denied Exxon's motion for reconsideration, again based on the Second Circuit's decision in *Peralta* and this Court's decision in *Minturn*.

In a Summary Order dated April 5, 1990, the Second Circuit affirmed the judgment of the district court "substantially for the reasons given" in the two district court opinions. (A-1). Exxon seeks a writ of certiorari respecting that portion of the Summary Order sustaining the denial of admiralty jurisdiction on the claim for the Jeddah delivery.

REASONS FOR GRANTING THE WRIT

The lower court opinions held that Exxon acted as an agent and hence its claim was outside admiralty jurisdiction based on *Peralta Shipping Corp. v. Smith & Johnson (Shipping) Corp.*, 739 F.2d 798 (2d Cir. 1984), *cert. denied*, 470 U.S. 1031 (1985). *Peralta*, in turn, was based on this Court's one page decision in *Minturn v. Maynard*, 58 U.S. (17 How.) 477 (1855).

In *Minturn*, this Court held, apparently on the then prevalent view that certain types of relief were not available in admiralty, that an action by a "general agent or broker" against the vessel owner for money expended for vessel repairs, supplies and services was outside admiralty jurisdiction. This Court stated: "[t]he libel shows nothing but a demand for a balance of accounts between agent and principal, for which an action of *assumpsit*, in a common law court, is the proper remedy." *Id.* at 477.

I. Conflict in The Circuits Over *Minturn*

The circuits have been and continue to be in conflict on the viability of the *Minturn* rule. As Justice Blackmun stated in his dissent from the denial of certiorari[1] in *Peralta Shipping Corp. v. Smith & Johnson (Shipping) Corp.*, 470 U.S. 1031, 1033-4 (1985):

> Not only is the *Minturn* rule of dubious validity, but in efforts to narrow its application, the Courts of Appeals have developed a number of equally questionable exceptions to the rule that have created confusion and disagreement.
>
> * * *
>
> The conflict between the approaches to this question taken by the Courts of Appeals is reason enough to grant this petition, for uniformity and predictability in the maritime industry were the ends sought in the Constitution when federal-court maritime jurisdiction was created in the first instance. A substantial argument has been advanced that the rule established in *Minturn* improperly excludes from federal maritime jurisdiction disputes that directly concern the business of maritime commerce. In light of the strength of that argument, of

1 Three of eight Justices would have granted certiorari in *Peralta*. Justice Marshall joined in Justice Blackmun's dissent. Justice Brennan, without joining the dissent, also voted to grant certiorari. Justice Powell took no part in the consideration of the petition.

the confusion and conflict in the courts, and of the need for a uniform rule, I would grant this petition.

A. *Minturn* in the Second Circuit

The Court of Appeals for the Second Circuit has "faithfully adhered to the *Minturn* holding" although recognizing its "erosion in other circuits" and "welcom[ing]" its demise by this Court. *Peralta Shipping Corp. v. Smith & Johnson (Shipping) Corp.*, 739 F.2d 798, 802-4 (2d Cir. 1984), *cert. denied*, 470 U.S. 1031 (1985). In *Peralta*, the Second Circuit held there was no admiralty jurisdiction on a claim brought under an agency contract which provided for the agent to perform a wide variety of services to vessels calling at United States Gulf ports.

B. *Minturn* in the Ninth Circuit

In *Hinkins Steamship Agency, Inc. v. Freighters, Inc.*, 351 F. Supp. 373 (N.D.Cal. 1972), *aff'd*, 498 F.2d 411 (9th Cir. 1974) the Ninth Circuit found that admiralty jurisdiction existed in an agent's suit for a balance due for a variety of marine services rendered to a vessel arranged through the agent. The *Minturn* rule was rejected by the Ninth Circuit with the comment that *Minturn* and other such cases "[u]nder more modern decisions" are "of doubtful validity." 498 F.2d at 412.

C. *Minturn* in the Fifth Circuit

The Fifth Circuit has held, despite *Minturn*, that admiralty jurisdiction exists in a suit under a managing agency contract pursuant to which the managing agent procured freight contracts, collected freights, paid operating expenses and remitted profits to the shipowner. *Hadjipateras v. Pacifica, S.A.*, 290 F.2d 697 (5th Cir. 1961). The Second Circuit has acknowledged that it considers actions on such contracts outside admiralty on the basis of *Minturn*. In commenting on its prior decisions involving managing agency contracts, the Second Circuit stated in *Peralta* that there is "no material distinction" between a managing agency contract and the agency contract involved in that case. *Peralta*, *supra*, 739 F.2d at 804.

D. *Minturn* in the Eleventh Circuit

Since *Peralta*, the issue has continued to arise. *E.S. Binnings, Inc. v. M/V SAUDI RIYADH*, 815 F.2d 660 (11th Cir. 1987) involved an agency agreement under which the agent arranged cargo bookings and performed documentation, financial and husbanding services for vessels. The district court in that case adopted the rule that admiralty jurisdiction existed based on the above decisions from the Fifth and Ninth Circuits. The Court of Appeals for the Eleventh Circuit reversed, adopting the Second Circuit's view of *Minturn*. The Eleventh Circuit noted "that the rule that such contracts are not within the admiralty jurisdiction has been condemned by commentators" but only the "Supreme Court is the appropriate court" to overrule *Minturn*. *Id.* at 665 n.4. It also lamented that this Court had recently "declined to pick up the gauntlet." *Id.*

E. Special/General Agents

A number of circuits have added to the confusion concerning the *Minturn* rule by distinguishing between "special" and "general" agents, holding that admiralty jurisdiction exists where the agent is merely a "special" one. Cases adopting this rule include *Ameejee Valleejee and Sons v. M/V VICTORIA U.*, 661 F.2d 310 (4th Cir. 1981) and *Compagnia Maritima La Empresa, S.A. v. Pickard*, 320 F.2d 829 (5th Cir. 1963). The district court in the case at bar rejected the special agent/general agent distinction. (A 12-16).

II. *Minturn* Should Be Overruled Or At Least Limited

Minturn should be overruled because it is based on an anachronistic premise and because an agency relationship involving the supply of necessaries to a vessel is an integral part of the shipping industry and thus should be within admi-

ralty jurisdiction. Furthermore, the exclusion of claims based on such relationships is directly contrary to a major policy concern underlying the grant of federal admiralty jurisdiction—the need for uniformity of law and the protection of the shipping industry and maritime commerce.

A. *Minturn*'s Rationale Is Anachronistic

In *Minturn*, this Court dismissed the agent's claim on the ground that it was nothing more than an action of "assumpsit," the jurisdiction for which rested in the common law court. Since *Minturn*, this Court has eschewed such a narrow view of admiralty jurisdiction. In *Archawski v. Hanioti*, 350 U.S. 532, 535-6 (1956) this Court stated that: "[t]he philosophy of *indebitatus assumpsit* is, indeed, not wholly foreign to admiralty. . . . Rights which admiralty recognizes as serving the ends of justice are often indistinguishable from ordinary quasi-contractual rights created to prevent unjust enrichment." As Judge John R. Brown, who has been called "our leading admiralty authority,"[2] observed in *Hadjipateras*, *supra*, 290 F.2d at 704-5:

> If, because the process of adjudication goes a step beyond 2 plus 2, the admiralty loses power, we would have the spectacle of things essentially maritime and thereby automatically within the constitutional supremacy clause, *Kossick v. United Fruit Co.*, 1961, 81 S. Ct. 886, being forced into common law, or equity, courts for determination. Indeed, it would be even more absurd. It would, barring the accident of diversity of citizenship, send essentially federal problems to state courts . . . .

In fact, the availability of equitable relief in admiralty is now well established. As Judge Brown colorfully noted in *Compania Anonima Venezolana De Navegacion v. A.J. Perez Export Co.*, 303 F.2d 692 (5th Cir.) *cert. denied*, 371 U.S. 942 (1962): "The Chancellor is no longer fixed to the woolsack. He may stride the quarter-deck of maritime jurisprudence and, in the role of admiralty judge, dispense, as would his land-locked brother, that which equity and good conscience impels." 303 F.2d at 699 (footnote and citations omitted). *See also Swift & Co. Packers v. Compania Colombiana Del Caribe S.A.*, 339 U.S. 684, 691-2 (1950); *Krauss Bros. Lumber Co. v. Dimon S.S. Corp.*, 290 U.S. 117, 124 (1933).

2 *Chevron Oil Co. v. Huson*, 404 U.S. 97, 115 (1971).

B. Commentator Criticism of the *Minturn* Rule

Quite apart from the basis of *Minturn* being anachronistic, the leading commentators have sharply criticized the *Minturn* rule as being an "anomalous exception" to admiralty jurisdiction and of "dubious defensibility." G. Gilmore & C. Black, *The Law of Admiralty*, 22, 28 n.94b (2d ed. 1975). They also state: "It is predicted that the Supreme Court, when the issue reaches it, will hold 'general agency' and other vessel-management agreements within the jurisdiction—along with actions for accountings on them." *Id.* at 28 n.94b.

Similarly, Professor Moore characterizes the distinctions in this area as "contrived and not based upon sound policy," 7A J. Moore & A. Palaez, *Moore's Federal Practice*, ¶ .250, 3003 (2d ed. 1988) and concludes respecting agency and brokerage contracts: "[q]uite clearly, such agreements are an integral part of, and in furtherance of, maritime commerce and, consequently, should be cognizable within the admiralty jurisdiction of the district courts." *Id.* at 3006.

C. Uniformity of Maritime Law

The Constitutional grant of admiralty jurisdiction was made to harmonize admiralty law among the several states. 1 S. Freidell, *Benedict on Admiralty* § 105 (7th ed. 1989). Indeed, "uniformity and predictability in the maritime industry were the ends sought in the Constitution . . . ." *See* Justice Blackmun's dissent from the denial of certiorari in *Peralta*, *supra*, 470 U.S. at 1034.

Minturn disrupts such uniformity and predictability. Given the conflicting approach of the lower courts, an agent arrang-

ing on its credit for identical supplies or services to two vessels may be subject to two differing views of *Minturn*, depending upon where the agent brings suit, or can bring suit, for reimbursement. The agent may acquire a federal lien claim against one of the vessels, for example where suit is in the Fifth or the Ninth Circuits. As to the other vessel, however, the agent may well be relegated to state law and state remedies, and be deprived of the benefit of the federal judiciary's expertise in maritime matters. If the *Minturn* rule as originally announced holds sway, all agents in all cases will be left to state law and remedies, which vary from state to state. The need for a single, uniform, national rule, both to protect the American maritime service industry and to promote orderly interstate and international maritime commerce is self-evident.

D. The *Minturn* Rule Fails to Protect a Class That Is Critical to Maritime Commerce

The 1971 Amendments to the United States Maritime Lien Act, formerly 46 U.S.C. §§ 971-976, now codified at 46 U.S.C.A. §§ 31305-31307, 31341-31342 (the "Lien Act"), were propelled by strong public policy in favor of those who provide necessary services or supplies to vessels in the maritime commerce of the United States. *Gulf Trading & Transport Co. v. VESSEL HOEGH SHIELD*, 658 F.2d 363 (5th Cir. 1981) (Brown, J.), *cert. denied*, 457 U.S. 1119 (1982). In large measure, the purpose of the Lien Act is to protect such persons by granting them maritime liens against the vessels supplied. Thus, the Act has the salutary effect of insuring that credit for necessary services or supplies flows to vessels in maritime commerce, thereby promoting the servicing of vessels in a speedy and efficient manner. *See* 658 F.2d at 367.

Under the *Minturn* rule, an agent who arranges, on his own credit, a wide array of critical supplies and services for a vessel, thereby performing a key role in keeping the vessel trading in maritime commerce, is denied federal lien protection. On the other hand, a non-agent who provides a single

service to a vessel, no matter how insignificant,[3] obtains federal lien protection. This result defies common sense. The *Minturn* rule should, at the very least, be limited so that admiralty jurisdiction and its lien remedies apply in the case where an agent arranges basic marine services or supplies to a vessel and pays for them out of the agent's funds.

Faced with the denial of federal maritime lien protection under the *Minturn* rule, an agent has to decide whether it should arrange for vessel services or supplies without first having received cash in hand from the principal/vessel owner. Furthermore, if the provision of vessel services or supplies appears to be exhausting such cash in hand, then the agent must either take the risk of not being adequately secured for monies expended on behalf of the principal/vessel owner, or order that the provision of services or supplies cease. Expeditious provision of services and/or supplies is critical to maritime commerce, as modern commercial vessels can load and discharge their cargo at any single port in less than twenty-four hours. The *Minturn* rule fails to give protection to a vital segment of maritime commerce. Such protection is, as this Court has recently recognized, "at the heart of admiralty jurisdiction." *Sisson v. Ruby*, 58 U.S.L.W. 4941, 4942 (U.S. June 25, 1990); *see also Foremost Insurance Co. v. Richardson*, 457 U.S. 668, 674 (1982).

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3 Judicial interpretation of a "necessary" is extremely broad and has included spirits delivered to a pleasure yacht. G. Gilmore & C. Black, *The Law of Admiralty*, § 9-34, n.185 (2d ed. 1975).

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review that portion of the judgment of the United States Court of Appeals for the Second Circuit relating to the Jeddah delivery.

Respectfully submitted,

ARMAND MAURICE PARÉ, JR.
Counsel of Record

BRADLEY F. GANDRUP, JR.

NOURSE & BOWLES
Counsel for Petitioner
One Exchange Plaza
At 55 Broadway
New York, New York 10006
(212) 952-6200

July 3, 1990

APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Filed April 5, 1990

Nos. 89-7986, 89-7988

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 5th day of April, one thousand nine hundred and ninety.

PRESENT:

HONORABLE WILFRED FEINBERG
HONORABLE GEORGE C. PRATT
HONORABLE JOHN M. WALKER, JR.
Circuit Judges

EXXON CORPORATION,

Plaintiff-Appellant,
Cross-Appellee,

—against—

CENTRAL GULF LINES, INC., et al.,

Defendants-Appellees,
Cross-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

UPON CONSIDERATION WHEREOF, it is hereby ordered, adjudged and decreed that the judgment of said district court is AFFIRMED.

1. Plaintiff-appellant and cross-appellee Exxon Corporation (Exxon) appeals from that portion of the judgment of the United States District Court for the Southern District of New York, entered on the opinions and orders of William C. Conner, J., that dismissed its claim for a maritime lien for a supply of bunker oil in Jeddah, Saudi Arabia, against defendants-appellees and cross-appellants Central Gulf Lines, Inc. (Central), in personam, and the M/V Green Harbour ex William Hooper (the Hooper) and a letter of credit, in rem, for lack of admiralty jurisdiction. Central et al. cross-appeal from that portion of the judgment granting Exxon's claim for a lien with respect to the delivery of bunker oil in New York.

2. The judgment of the district court is affirmed, substantially for the reasons given in Judge Conner's two thorough opinions reported at 707 F. Supp. 155 and 717 F. Supp. 1029.

/s/ WILFRED FEINBERG
WILFRED FEINBERG

/s/ GEORGE C. PRATT
GEORGE C. PRATT

/s/ JOHN M. WALKER, JR.
JOHN M. WALKER, JR.

Appendix B

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

July 21, 1989

No. 86 Civ. 9445 (WCC)

EXXON CORPORATION,

Plaintiff,

—v.—

CENTRAL GULF LINES, INC., in personam and the M/V GREEN HARBOUR (ex William Hooper) in rem, her engines, boilers, tackle, etc. and a certain Letter of Credit No. P 621208 dated December 26, 1984 issued by the Chase Manhattan Bank, N.A., in rem.,

Defendants.

Nourse & Bowles, New York City, for plaintiff (Armand M. Pare, Jr., and Bradley F. Gandrup, Jr., of counsel.)

Bigham Englar Jones & Houston, New York City, for defendants (Francis A. Montbach, and Karin A. Schlosser, of counsel.)

OPINION AND ORDER

WILLIAM C. CONNER, *District Judge.*

Plaintiff Exxon Corporation ("Exxon") moves for reconsideration of the Court's Opinion and Order, dated March 3, 1989, dismissing its claim for a maritime lien, under the Fed-

eral Maritime Lien Act (the "Act"),[1] for want of admiralty jurisdiction. *See Exxon Corporation v. Central Gulf Lines, Inc.*, 707 F.Supp. 155 (S.D.N.Y. 1989).

I have carefully considered "the matters [and] controlling decisions" which Exxon "believes the court has overlooked," Local Rule 3(j); *accord Ruiz v. The Commissioner of the Department of Transportation of the City of New York*, 687 F.Supp. 888, 890 (S.D.N.Y.), *aff'd* 858 F.2d 898 (2d Cir. 1988), but conclude that Exxon's claim was rightly dismissed.

BACKGROUND

Familiarity with my March 3, 1989 Opinion is presumed. Defendant Central Gulf Lines, Inc. ("Central Gulf") owns a vessel, the Green Harbour ex William Hooper (the "Hooper"), upon which plaintiff has asserted a lien. The Hooper was chartered by the Waterman Steamship Corporation ("Waterman"), which for forty years used Exxon as its exclusive worldwide supplier of bunkers.

Under the contract governing the relationship between Exxon and Waterman in 1983, Waterman's fuel requirements were provided by the "Seller" (Exxon) or by "Supplying Companies." Exhibit 3 to Affidavit of James E. Sharkey [hereinafter Waterman/Exxon Contract]. Waterman made purchases under this agreement by telephoning Exxon in New York and providing Exxon with delivery information. Exxon would affect delivery on its own, or cause a local supplier to deliver the bunkers to the vessel. Exxon would invoice Waterman for the fuel supplied, and if a local supplier was used, pay the supplier.

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1 The Act provides, in pertinent part:

> Any person furnishing . . . supplies . . . or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.

46 U.S.C. § 971.

The bunkers delivery which is the subject of this motion occurred on October 26, 1983, when the Hooper put in at Jeddah, Saudi Arabia. In order to fulfill its obligation to procure fuel for Waterman at that port, Exxon used a local supplier, Arabian Marine Operating Co., Ltd. ("Arabian Marine").

Exxon had promised Arabian Marine that it would "solicit and arrange for the sale of marine fuels to international customers having bunkering requirements at the port of Jeddah." In return for Exxon's services, Arabian Marine had agreed to pay Exxon on a "commission." Exhibit 4 to Affidavit of James E. Sharkey ¶¶ 1 & 5 [hereinafter Exxon/Arabian Marine Contract].

In my March 3, 1989 Opinion, I found that Exxon's agreement to procure bunkers for Waterman in Saudi Arabia was outside of the Court's admiralty jurisdiction. I observed that the Second Circuit in *Peralta Shipping Corp. v. Smith & Johnson (Shipping) Corp.*, 739 F.2d 798 (2d Cir.1984), *cert. denied*, 470 U.S. 1031, 105 S.Ct. 1405, 84 L.Ed.2d 791 (1985), had reaffirmed the rule that "agency contracts under which a party agrees to solicit or procure freight, passengers, crew, or supplies for a vessel are not maritime contracts," 707 F.Supp. at 159, and concluded that Exxon's services with respect to the Saudi Arabian delivery constituted such a preliminary contract:

> Under the contract, Exxon served in two distinct capacities. Its first role was as a supplier of marine fuels. When Waterman vessels called at ports where Exxon maintains its own bunker stations, Exxon promised to physically deliver the bunkers. When the vessels, however, called at ports where Exxon depends on local suppliers, Exxon promised to arrange for the local suppliers to provide Waterman ships with fuel. When acting in this latter capacity, Exxon was merely Waterman's agent.
>
> Exxon wore its agency hat when it procured bunkers for the Hooper in Jeddah. Its services with respect to the Jeddah delivery included taking Waterman's order,

> contacting Arabian Marine, maintaining a bunkers contract with Arabian Marine, and advancing Waterman the purchase price by paying Arabian Marine. It never actually possessed the fuel that was supplied to the Hooper at Jeddah. Indeed, pursuant to Exxon's contract with Arabian Marine, title to the fuel passed directly from Arabian Marine to the Hooper. In return for these services, Exxon received a commission which was deducted from Arabian Marine's invoice to Exxon. In sum, Exxon's role in the transaction was strictly "shoreside," *E.S. Binnings* [v. M/V Saudi Riyadh], 815 F.2d [660] at 664 [11th Cir.1987]. As Exxon put it in its discussion of the choice of law issue, the locus of Exxon's relationship with Waterman was the United States, not the dock in Jeddah. *See* Plaintiff's Memorandum of Law at 16. Exxon's services were thus "preliminary"; they ended before the bunkers reached the Hooper.

707 F.Supp. at 160.

DISCUSSION

Exxon offers four reasons why I erred in dismissing its lien on jurisdictional grounds: (1) Exxon sold the bunkers to Waterman; it was not Waterman's agent; (2) Exxon was not a general agent within the meaning of *Peralta*; it was a special agent and thus entitled to assert a maritime lien; (3) the Waterman/Exxon Contract was not a preliminary contract; and (4) Exxon extended credit to the Hooper, and can claim jurisdiction on that ground. Plaintiff also argues that "[i]n the event the Court considers no such lien exists . . . further evidence should be allowed on the nature of the Exxon/Waterman Fuel Oil Contract" and that "any question of Exxon's rights under Saudi [law] should be reserved." Plaintiff's Brief at 28-29. I will address each argument individually, and then briefly discuss the merits of Exxon's underlying claim.

I. *Agent or Seller*

Plaintiff first contends that the Waterman/Exxon Contract should be characterized as a sales contract, not an agency contract. "[A]t the very most a recasting of the contract would make any 'Supplying Company' a subcontractor of Exxon, and Exxon the contractor." Plaintiff's Brief at 9. I disagree.

It is well-settled that an agency relationship involves: (1) consent; (2) fiduciary duty; (3) absence of gain or risk to the agent; (4) control by the principal; and (5) power of the agent to alter the legal relations between the principal and third persons and between the principal and himself. *Boss v. Int'l Brotherhood of Boilermakers*, 567 F.Supp. 845, 847 n. 1 (N.D.N.Y.) (Miner, J.), *aff'd* 742 F.2d 1446 (1983), *cert. denied*, 469 U.S. 819, 105 S.Ct. 89, 83 L.Ed.2d 36 (1984); *Restatement (Second) of Agency* §§ 12, 13 & 14 (1958).[2]

It is sometimes difficult, however, to distinguish between a seller or supplier and a mere agent. The Restatement suggests that "[o]ne who contracts to acquire property from a third person and convey it to another is the agent of the other only if it is agreed that he is to act primarily for the benefit of the other and not for himself." *Id.* § 14K. The comment to that section explains:

> Factors indicating that the one who is to acquire the property and transfer it to the other is selling to, and not acting as agent for, the other are: (1) That he is to receive a fixed price for the property, irrespective of the price paid by him. This is most important. (2) That he acts in his own name and receives the title to the property which he thereafter is to transfer. (3) That he has an independent business in buying and selling similar property. None of these factors is conclusive.

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2 Only the last three characteristics are at issue here. Since its relationship with Waterman is based on a contract, Exxon has not contended that consent is lacking. Moreover, presumably because fiduciary duty arises out of an agency relation, Exxon has not suggested that this element is absent.

Id. comment a.[3] As the factors listed above suggest, an important difference between sellers and agents is the manner in which risk of loss and opportunity for gain are distributed:

> Who is to be affected by the fluctuations of the price is often significant. If the one who is to supply the goods is to do so at a fixed price regardless of market fluctuations, there is strong evidence of a sale rather than of agency. Upon whose responsibility are the goods to be procured, is also a significant question. If they are to be obtained upon the credit of the person, who is to supply them without possibility of recourse to the person to whom they are to be supplied, this is also strong evidence of a sale. Who is to determine of whom, where, to what extent, upon what terms, the goods to be supplied are to be procured? If the person who is to supply them is to determine these matters, [then the transaction may be a sale].

1 F. Mechem, *Law of Agency* § 46 (1914).

After reviewing the terms of both contracts involved in this case, I remain convinced that the elements of an agency relationship are satisfied here. First, Exxon's likelihood of profit or loss was fixed. Although Exxon asserts that its responsibilities under the agreement was to "provide the minimum quantities of fuel irrespective of any difficulties it may have in obtaining the supplies," and that if it were an agent, it would have only had to use its "best efforts" to procure bunkers, Plaintiff's Brief at 5, Exxon's duties under the contract were in fact much less onerous then it claims. Practically, Exxon was only obligated to exercise its best efforts to procure fuel for Waterman. The contract permitted Exxon to escape performance where difficulties "not reasonably within [its] control" intervened and protected Exxon from fuel shortages caused by "any . . . event." Waterman/Exxon Contract § 6.7(C) & (D). Moreover, the contract insulated

3 Plaintiff asks the Court to consider the factors listed in the comment to Section 14J of the Restatement. Plaintiff's Reply Brief at 14-15. That subdivision is inapplicable, however, because it deals with distinguishing between an agent and a buyer, not an agent and a seller.

Exxon from shifts in the market price of fuel, by basing the price of the bunkers on the local supplier's price. *Id.* § 4.1 (Waterman was charged "the established selling price effective for the time and place of delivery by Seller or Supplying Company"); *see also* Exxon/Arabian Marine Contract ¶¶ 4 & 5 ("The product price to be invoiced to Exxon . . . shall be Arabian Marine's product selling price . . . at the time of delivery. . . . Payment for each marine fuel delivery is to be made by Exxon to Arabian Marine. . . . In return for services performed by Exxon, Arabian Marine will pay Exxon a commission. . . . [which] shall be deducted from the invoice issued by Arabian Marine and from Exxon's payment to Arabian Marine."); *Exxon*, 707 F.Supp. at 160 ("Exxon received a commission which was deducted from Arabian Marine's invoice to Exxon"). Since, as I noted in my previous Opinion, Exxon never held title to the fuel provided by the local suppliers, *Exxon*, 707 F.Supp. at 157, 160, the risk of loss shifted directly from the local supplier to Waterman. *See* Waterman/Exxon Contract § 6.7(E) (bunkers were "pumped at the risk and peril of Seller or Supplying Company up to that flange only").[4]

4 Exxon maintains that Section 2.1 of the Waterman/Exxon Contract gave rise to a "descriptive warranty" regarding the quality of the fuel delivered. *See* Plaintiff's Brief at 4. That Section provides:

> The Marine fuel to be sold hereunder shall be commercial grades of Bunker Fuel Oil and/or Intermediate Bunker Fuels and/or Marine Diesel Oil and/or Light Marine Diesel Oil and/or Marine Gas Oil offered at the time and place of delivery by Seller or by the Supplying/Delivering company. . . . Buyer shall have the sole responsibility for the selection and acceptance of Marine Fuel for use in the vessels to which Marine Fuel is delivered.

Nothing in this clause suggests that Exxon warranted the quality of fuel supplied by Arabian Marine. An express warrant by description is created only by the "seller." *See* N.Y.U.C.C. Law § 2-313 (McKinney 1964). When a local supplier was used, Exxon was not the "seller" within the meaning of the Uniform Commercial Code. *See id.* § 2-103(1)(d) (" 'Seller' means a person who sells or contracts to sell goods."); *id.* § 2-106 ("A 'sale' consists in the passing of title from the seller to the buyer for a price. . . ."). Moreover, if there were any doubt that Exxon did not warrant the quality of fuel delivered by local companies, the final sentence of Section 2.1 would put that doubt to rest.

Second, Exxon's performance under the contract was subject to Waterman's control. The gist of the contract was that, subject to minimum and maximum limits, Exxon would procure Waterman's fuel requirements. The only matter left to Exxon's discretion was which company would supply the fuel. This detail, however, was clearly immaterial to Waterman. Waterman was only interested in a worldwide supply of quality bunkers. It therefore retained control over fuel type and quality, as well as the method, location, and time of delivery. Waterman/Exxon Contract §§ 3.1 & 6.7(E).[5]

The Waterman/Exxon Contract empowered Exxon to alter Waterman's legal relationship with Arabian Marine. In the first place, the agreement authorized Exxon to "cause" local suppliers to sell fuel to Waterman. Waterman/Exxon Contract, preamble. Exxon could also obligate Waterman to indemnify the local supplier, *see, e.g., id.* § 6.2 ("Buyer shall reimburse Seller or Supplying Company for all additional expenses incurred in connection with" after-hour deliveries), and refrain from asserting certain claims against it, *see, e.g., id.* § 6.7(A) ("Buyer waives any claim against Seller or Supplying Company with respect to quality, quantity or price" not asserted within 45 days after delivery). Moreover, the

5 Plaintiff cites *Fenton v. Freedman*, 748 F.2d 1358 (9th Cir.1984), for the proposition that "if control may be exercised only as to the *result* of the services performed and not the means and methods by which it is accomplished, then the provider is an independent contractor and not an agent." *Id.* at 1362 (emphasis in original). This decision is based on California law, and I am not persuaded that the definition of agency is so limited under federal law. The only binding authority which plaintiff cites, *In re Shulman Transport Enterprises, Inc.*, 744 F.2d 293 (2d Cir.1984), is distinguishable. In that case, an airline claimed that a freight forwarder acted as its agent in collecting the carrier rates which the forwarder charged the shipper. The court rejected that claim on the ground that under the airline's contract with the forwarder, the airline had expressed no interest in how the forwarder used the funds it received from its customers. The Waterman/Exxon Contract, on the other hand, makes it clear that Exxon's local supplier could sue Waterman in the event it was not paid. *See* Waterman/Exxon Contract § 6.7(B) ("it is agreed that Seller and Supplying Company will have and may assert a lien against such vessel for the amount of the delivered price of said Marine Fuel").

local supplier did not only depend on Exxon's credit. Exxon could give the local supplier a lien on the vessel. *Id.* § 6.7(B). If, on the other hand, Arabian Marine had supplied the bunkers only on Exxon's credit, "without possibility of recourse" to the vessel, there would have been "strong evidence of a sale." 1 F. Mechem, *Law of Agency* § 46.

In sum, the language of the Waterman/Exxon Contract suggests that where Exxon depended on local suppliers, it was not a seller of marine fuel; it merely served as an agent, using its best efforts to procure bunkers that would satisfy Waterman's fuel requirements.[6]

II. *The Scope of the Peralta Rule*

When the Court of Appeals for the Second Circuit decided *Peralta*, it was presented with the option of distinguishing that case from the principle that preliminary contracts, and in particular general agency contracts, are not cognizable in the admiralty jurisdiction. The *Peralta* court acknowledged that this anomalous exception to the broad coverage of maritime jurisdiction had "suffered some erosion in other circuits," but stressed that "neither the Supreme Court nor the courts of this Circuit have departed from [the] teachings [of *Minturn* and its progeny]." 739 F.2d at 803; *see also id.* at n. 4. It eschewed any attempt "[t]o predicate jurisdiction on . . .

6 Exxon cites a number of cases that stand for the proposition that an independent contractor's use of a subcontractor does not transform it into an agent. *See Farwest Steel Corp. v. Barge Sea-Span 241*, 828 F.2d 522 (9th Cir. 1987), *cert. denied*, _____ U.S. _____, 108 S.Ct. 1594, 99 L.Ed.2d 909 (1988); *Marine Coatings of Alabama, Inc. v. United States*, 674 F.Supp. 819, 825 (S.D.Ala. 1987); *Spyral Marine Services, Inc. v. M.T. Silver Lady*, 82 Civ. 2313(ELP), Slip Op. (S.D.N.Y. January 31, 1983); *The Juniata*, 277 F. 438 (D.Md. 1922). Just because some independent contractors are not agents, and therefore entitled to sue in admiralty, does not mean that all independent contractors can bring such suits. An independent contractor may or may not be an agent. It is only colloquially that the terms are necessarily distinct. *Columbia Broadcasting System, Inc. v. Stokely-Van Camp, Inc.*, 522 F.2d 369, 375 & n. 14 (2d Cir. 1975). The large amount of control retained by Waterman and the lack of risk assumed by Exxon indicate that Exxon, whether or not an independent contractor, was an agent, not entitled to a maritime lien.

hair-splitting distinctions," since such an effort "would blur, if not obliterate a rather clear admiralty demarcation." *Id.* at 802. Although, the *Peralta* court hoped that the Supreme Court would eliminate the preliminary contract rule by granting *certiorari*, *id.* at 804, the Supreme Court declined the invitation, 470 U.S. 1031, 105 S.Ct. 1405, 84 L.Ed.2d 791 (1985), and therefore left the law of this Circuit intact.

In its motion for reconsideration, plaintiff asks me to do what the Second Circuit refused to do in *Peralta*: Follow the other circuits which have carved exceptions out of the preliminary contract rule. I am convinced that further subdividing this area of the law would only serve to enhance confusion, and would violate the spirit of the *Peralta* decision.

A. Special/General Agent Distinction

Plaintiff argues that, at most, Exxon acted as Waterman's special agent, and cites cases distinguishing between special and general agents. I disagree with Exxon's contention that it was not a general agent.

Although the typical general agent in maritime cases performs husbanding services, as the Second Circuit has pointed out, *Ingersoll Milling Machine Co. v. M/V Bodena*, 829 F.2d 293, 302 (2d Cir. 1987), *cert. denied*, ____ U.S. ____, 108 S.Ct. 774, 98 L.Ed.2d 860 (1988), it is well settled that "[c]ontinuity of service rather than the extent of discretion or responsibility is the hall-mark of the general agency." *Restatement (Second) of Agency* § 3 comment a (1958); *accord Todd Shipyards Corp. v. The City of Athens*, 83 F.Supp. 67, 88 (D.Md.1949). A continuing relationship is particularly significant in maritime law, since a business relationship of substantial duration suggests an absence of reliance on a vessel's credit:

> The thing which characterizes a general agent as known in the maritime fraternity is a mutual interdependence on the financial credit and stability of each of the parties, agent and owner. The arrangement by its very nature contemplates that the agent must do many things in advance of the arrival or after the departure of the vessel. Reimbursement of his expenditures and the payment of his fees, whether by commissions on freight or otherwise, is not dependent upon the profitableness of that immediate venture. Here, on the other hand, this was a single-shot affair in which none of the parties dealt on the *credit* of the others. Presumably each took into account the general business integrity and reliability of the other.

Compagnia Maritima La Empresa, S.A. v. Pickard, 320 F.2d 829, 832 (5th Cir. 1963) (emphasis in original).[7]

Exxon was Waterman's sole procurer of bunkers for forty years. Moreover, its authority, with respect to the business of obtaining fuel for Waterman vessels, was quite broad. As plaintiff put it, "[i]t was Exxon who solely determined the physical supplier under the Contract . . . ; [and] it was Exxon who had the right to determine allocation of supplies in the event of shortage of oil among Exxon's various customers." Plaintiff's Reply Brief at 12. I am thus persuaded that plaintiff was Waterman's general agent with respect to fuel supplies.

Even if Exxon had acted as a special agent, I would dismiss this case for lack of subject matter jurisdiction, since special agents that provide preliminary services are outside the admiralty jurisdiction. As Exxon readily admits, Plaintiff's Reply Brief at 9 n. 4, I rejected the idea of a special/general agent distinction in my decision granting summary judgment in defendant's favor:

> "[I]t would be anomalous to hold that a general agency agreement" to, among other things, arrange for fuel

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7 Long-standing agency relationships are considered general agencies in admiralty law because the agent typically relies on the credit of his principal, rather than on that of the vessel. It does not follow, however, that an agent who serves a principal in a series of transactions can claim that he is a special agent or otherwise entitled to a lien if he can prove that he relied on the credit of the vessel. Such a standard would demand "unmanageable burdens of proof concerning the nature of the credit extended." Comment, *General Agency Agreements and Admiralty Jurisdiction*, 17 Conn.L.Rev. 595, 608 (1985). *But see M. Vivian Pierce*, 48 F.2d 644, 645 (D. Mass. 1931) (*dictum*).

> supplies "is outside admiralty, while an agreement between a principal" and an agent who has procured bunkers for the vessel "falls within the grant of jurisdiction." *See Continental Cameras Co. v. FOA & Son Corp*, 658 F.Supp. 287, 289 (S.D.N.Y.) (Sand, J.) (insurance broker), *aff'd* 831 F.2d 45 (2d Cir.1987) (per curiam); *see also Boyd, Weir & Sewell, Inc. v. Fritzen-Halcyon, Lijn, Inc.*, 709 F.Supp. 77 (S.D.N.Y.1989) (Cannella, J.) (chartering agent).

707 F.Supp. at 160-61. Exxon nevertheless argues that I overlooked case law recognizing such a distinction. Its primary support for this contention is a student-written article, Comment, *General Agency Agreements and Admiralty Jurisdiction*, 17 Conn.L.Rev. 596 (1985) [hereinafter Comment].

Yet, as the Comment itself points out, the Second Circuit has refused to distinguish between general and special agents. "The Second Circuit approach . . . views general agency agreements as equivalent to brokerage agreements and excludes both from admiralty." *Id.* at 623. "This confusion probably stemmed from the loose use of the word 'agent' as a practical equivalent of 'broker' in several early cases." *Id.* at 612. The Comment adds that, although there is one case, *P.T. Perusahaan Pelayaran Samudera Trikora Lloyd v. T.S. Salzachtal*, 373 F.Supp. 267 (E.D.N.Y. 1974), which allowed a special agent to assert a lien, this case "is an enigma in Second Circuit case law." Comment at 608 n. 53.

The Comment maintains, however, that the Second Circuit cases are wrongly decided. Thus the author claims that Judge Weinfeld's decision in *P.D. Marchessini & Co. v. Pacific Marine Corp.*, 227 F.Supp. 17 (S.D.N.Y.1964), "erroneously applied case law directed at brokers to exclude a general agent from admiralty." Comment at 614. And Judge Learned Hand's analysis in *Admiral Oriental Line v. United States*, 86 F.2d 201 (2d Cir.1936), is considered "similarly flawed." The Comment also states that Professor Moore "confuses the rights of general agents with those of brokers," since "of the ten cases cited [on this issue in his treatise], six are from the Second Circuit." Comment at 616 n.

86 (citing 7A J. Moore, A. Pelaez, *Moore's Federal Practice*, ¶ .250 n. 1 (2d ed.1983) [hereinafter *Moore's*]).

I decline to recognize a distinction that courts in this Circuit have eschewed for decades. Although there may be historical grounds to hold that special agency contracts are maritime, I am persuaded that differentiating between special and general agents would be irrational. As one commentator explained:

> To extend maritime jurisdiction to such a "specific" agent rather than to one who, on a continuing basis, procures all sorts of services, both necessary and unnecessary, is not a rational distinction. . . . A "specific" agent who merely procures services is performing shoreside preliminary functions, regardless of how necessary they are to the operation of the vessel. The decisions, therefore, have stressed the subject matter of the claim, i.e. the duties performed by the agent, rather than the nomenclature of the agent.

McAllister, *Admiralty Jurisdiction Extends to Agent Who Actually Performs Essential Services for Vessel*, 4 J.Mar.L. & Com. 480, 490 (1973).

Moreover, Judge Lumbard recently applied the *Peralta* rule to a case involving a special agent. In *Johnson Products Co. v. M/V La Molinera*, 619 F.Supp. 764 (S.D.N.Y.1985), a freight forwarder argued that the shipper's claims were "not within the Court's admiralty and maritime jurisdiction because they derive essentially from an agency relationship—not a maritime contract—between the plaintiffs and [the freight forwarder]." *Id.* at 765. Judge Lumbard agreed that this special agency contract was not maritime:

> As freight forwarder, ICS performed a variety of services preliminary to JPC's procurement of an actual carrier. Although the *carrier's* obligation to the shipper certainly comes within the Court's admiralty jurisdiction, the obligations arising out of preliminary procurement of and arrangement for carriage contracts do not. *See Peralta Shipping Corp. v. Smith Johnson (shipping)*,

739 F.2d 798 (2d Cir.1984); *P.D. Marchessini & Co. v. Pacific Marine Corp.*, 227 F.Supp. 17 (S.D.N.Y. 1964) (Weinfeld, J.).

Id. at 766-67 (emphasis in original). In sum, the *Peralta* rule is not limited to general agency contracts.

B. The Preliminary Contract Rule

Exxon contends that the Waterman/Exxon Contract was not a preliminary contract. First, it maintains that the preliminary contract rule and the general agency rule have been accidentally fused by the courts in this Circuit. *See* Plaintiff's Brief at 27. Again, however, Exxon's primary support is the student-written Comment:

> The court [in *Cory Bros. & Co. v. United States*, 51 F.2d 1010 (2d Cir.1931)] first cited in full that section of the *Thames* that called for the exclusion from admiralty of preliminary service contracts, a proper reference considering that the court was addressing the cargo broker aspects of the contract. The court immediately followed this reference, however, with the comment: *'Apparently the same ground explains the holding in Minturn v. Maynard.'* No single sentence in the entire body of case law concerning general agency agreements has done more to distort their proper interpretation; the *Cory Bros.* court, because of its complete misunderstanding of *Minturn*, carelessly merged two bodies of entirely unrelated case law.

Comment at 612-13 (emphasis in original; footnotes omitted), *quoted in* Plaintiff's Brief at 27-28.

It would be inappropriate for me to disentangle the preliminary contract rule from the general agency rule. The Second Circuit recently described the agency rule as a subset of the preliminary contract rule:

> A long-recognized principle for determining whether a contract is maritime is that agreements preliminary to maritime contracts are not cognizable in admiralty. . . .

> Applying this principle, our Court, despite questioning its continuing validity, has recently affirmed the long-standing, well settled rule laid down by the Supreme Court in *Minturn v. Maynard* . . . that general agency contracts are not cognizable in admiralty. . . .

Ingersoll Milling, 829 F.2d at 301-02. Moreover, I am not persuaded that the two principles should be distinct, since the agency exception to maritime jurisdiction is less of an anomaly when viewed as a subset of the preliminary contract doctrine.

Finally, the services performed by Exxon were merely preliminary. Exxon contends that since there was no written agreement between Waterman and Arabian Marine, the Waterman/Exxon Contract was not preliminary to a maritime contract. Plaintiff's Brief at 26. I disagree.

The Waterman/Exxon Contract authorized Exxon to create a contractual relationship between Waterman and Arabian Marine. Exxon agreed "to sell or cause [fuel] to be sold" to Waterman. Waterman/Exxon Contract, preamble. Where Exxon merely "caused" local suppliers to sell bunkers to Waterman, it promised to advance the suppliers payment for the fuel. In the event that Exxon defaulted, the local suppliers could look to Waterman. *Id.* § 6.7(B).

Moreover, the Exxon/Arabian Marine Contract "covers the solicitation of bunker customers by Exxon and *the sale and delivery of marine fuels as bunkers by Arabian Marine to such customers* at the port of Jeddah, Saudi Arabia." Exxon/Arabian Marine Contract ¶ 1 (emphasis supplied).

In sum, even if Waterman and Arabian Marine did not enter into their own written contract,[8] they were bound to each other by the agreements that Exxon, as agent, entered into with each of them. The Waterman/Exxon Contract was thus preliminary to a contract between Waterman and Arabian Marine for the sale of bunkers.

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8 The delivery receipt is a written document that can be considered a contract between Arabian Marine and Waterman. *See* Exxon/Arabian Marine Contract ¶ 9.

III. *The Extension of Credit*

Plaintiff also asks me to revisit the question whether admiralty jurisdiction can be based on the fact that Exxon furnished the Hooper with credit necessary to obtain the fuel. This contention was considered in my initial decision:

> [I]t might be argued that Exxon furnished the Hooper with the credit it needed to obtain the fuel, and thus was not a mere agent. . . . Defendant suggests, however, that a lien claimed by virtue of Exxon's extension of credit would arise only by subrogation, and would be governed by Saudi Arabian law. *See* Defendant's Memorandum of Law at 7-9. Although this may not be the case, *see Universal Shipping v. The Panamanian Flag Barge*, 563 F.2d 483, 484 (1st Cir.1976) (*dictum* distinguishing lien arising by subrogation when advance is given to discharge an existing lien from lien arising when advance is made for the purpose of permitting vessel to purchase other necessaries), plaintiff has not claimed a lien on the ground that it advanced the Hooper the funds needed to refuel, *see* Plaintiff's Reply Memorandum at 14. Moreover, the *Minturn* case itself involved a general agent who had "laid out" and "expended" funds for the ship "in paying for supplies." The Court nevertheless concluded that there was "nothing in the nature of a maritime contract in the case." *Minturn* [*v. Maynard*], 58 U.S. [477] at 477 [15 L.Ed. 235].

707 F.Supp. at 161.

Ordinarily, one who advances money to a ship for the purpose of satisfying an outstanding or future maritime lien, is entitled to a lien by virtue of subrogation. *The Emily B. Souder*, 84 U.S. (17 Wall.) 666, 21 L.Ed. 683 (1873); *see also* Ray, *Maritime Contract Liens*, 47 Tul.L.Rev. 587, 599 (1973) ("One who makes advances to pay for the necessaries that give rise to a maritime lien stands in the shoes of the supplier whose claim has been paid."). Such an advance is apparently considered a maritime contract.

Yet a brokerage contract, under which an agent provides services preliminary to a maritime contract, cannot be "bootstrapped" into admiralty jurisdiction simply because the agent has paid for the maritime services procured. Professor Moore explains:

> Can, for instance, an agent who has expanded his own money for maritime services or supplies furnished to the principal's vessel recover all, or the balance due, of such expenditures in a maritime action? While such agreements are not classic indemnity agreements, there is usually expressed or implied in such undertakings a provision that the agent will be indemnified for all reasonable expenses incurred on the principal's behalf. And, notwithstanding that indemnity agreements have been deemed maritime when contained in certain contracts, such as stevedoring, they have uniformly been deemed beyond the admiralty when between principals and agents.

Moore's ¶ 2.60[4] (footnotes omitted). Thus courts in this Circuit have held that general agency contracts are non-maritime, even where the agent has advanced funds for needed supplies. *See, e.g., Garcia & Diaz, Inc. v. Empresa Naviera De Cuba, S.A.*, 158 F.Supp. 147, 147 (S.D.N.Y. 1958) (case dismissed for want of admiralty jurisdiction: "The general rule, that [a general] agent acquires no maritime lien for payments made by it in the course of its business is well settled."). And, on apparently the same basis, Judge Haight has suggested that an insurance broker may not sue in admiralty to recover premiums advanced on the vessel owner's behalf. *Frank B. Hall & Co. v. S.S. Seafreeze Atlantic*, 423 F.Supp. 1205, 1209-10 (S.D.N.Y.1976).

Although the authorities do not explain the rationale underlying this principle, I believe that it can be understood as a means of limiting the use of maritime statutes, and in particular the granting of maritime liens, to cases where they are necessary to further maritime commerce. While "[m]oneys are not usually loaned to stangers, residents of distant and foreign countries, without security." *The Emily*

B. Souder, 84 U.S. at 671, federal intervention is not needed to induce a ship's agent, who has a continuing and substantial relationship with the owner or charterer of the vessel, to lay out funds. Indeed, while some courts have suggested that the important inquiry is not whether the advance itself is necessary, but whether the money has gone toward payment for a necessary, *see The Minnie & Emma*, 21 F.2d 991, 992 (D.Md.1927), there is no need to grant jurisdiction to brokers who advance the vessel funds in the ordinary course of the agency relationship. Even the Comment, once again relied on by plaintiff, admits that an agent may be disallowed a lien for advances if they are made "in the ordinary course of his agency." Comment at 620 n. 102.[9]

Exxon's extension of credit appears to have been incidental to its long-standing agency relationship with Waterman, which by itself would not be considered maritime. I am convinced that the admiralty jurisdiction should not be expanded to include the claim of Exxon, who, in the ordinary course of performing its long-term contract to procure bunkers for Waterman vessels, advanced funds for the fuel that it procured.

Exxon has failed to cite any binding authority to the contrary, and even the one case that it cites from this district, *Martran v. Steamship Co. v. Aegean Tankers Ltd.*, 170 F.Supp. 477 (S.D.N.Y.1959), is very different from the facts here. That case involved an owner's action against a subcharterer for fuel paid for by the owner. *Id.* at 478-89. The court did not discuss whether an agent that procures and pays for bunkers can bring a suit in admiralty against the

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9 Although the Comment concedes this point, its position on the issue of advances is otherwise at odds with the law of this Circuit.

> One acting as a special agent can assert a lien upon a vessel if his primary function is to procure and pay for necessary services and supplies. A general agent who fulfills the very same functions has at least an in personam right against an owner if he exercised a great degree of control over the vessel.
>
> . . . Under this approach, therefore, the contract in *Peralta* which involved an agreement to provide or pay for a number of necessary services, should have been found maritime.

Comment at 624 (footnote omitted).

vessel. I conclude that such cases are outside the admiralty jurisdiction.[10]

IV. *The Need for Further Evidence*

I see no reason to allow plaintiff to present further evidence regarding the nature of the Waterman/Exxon contract at this time. Plaintiff merely asserts the need for such a presentation, and offers no explanation as to how such a procedure might be helpful. "An opposing party's mere hope that further evidence may develop prior to trial is an insufficient basis upon which to justify the denial of the motion." *Contemporary Mission, Inc. v. United States Postal Service*, 648 F.2d 97, 107 (2d Cir.1981) (quoting *Neely v. St. Paul Fire & Marine Insurance Co.*, 584 F.2d 341, 344 (9th Cir.1978) (Palmieri, J.)). The request is therefore denied.

CONCLUSION

For the reasons stated above, plaintiff's motion for reconsideration of my Opinion and Order dated March 3, 1989 is denied.

SO ORDERED.

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10 Since I am persuaded that Exxon cannot claim a subrogated lien, I need not reach the question of whether such a lien would exist under Saudi Arabian law. Consequently, Exxon's request to submit evidence on Saudi Arabian law is denied.

Appendix C

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

March 3, 1989

No. 86 Civ. 9445 (WCC)

EXXON CORPORATION,

Plaintiff,

v.

CENTRAL GULF LINES, INC., in personam and the M/V GREEN HARBOUR (ex William Hooper) in rem, her engines, boilers, tackle, etc. and a certain Letter of Credit No. P 621208 dated December 26, 1984 issued by the Chase Manhattan Bank, N.A., in rem.,

Defendants.

Nourse & Bowles, New York City (Armand M. Pare, Jr., of counsel), for plaintiff.

Bigham Englar Jones & Houston, New York City (Francis A. Montbach, Karin A. Schlosser, of counsel), for defendants.

OPINION AND ORDER

WILLIAM C. CONNER, *District Judge*.

This is an *in rem* action to enforce maritime liens under 46 U.S.C.App. § 971. Plaintiff alleges that it has not been paid for bunker fuel furnished to defendant's vessel in Saudi

Arabia and New York, and that it is therefore entitled to liens. Defendant contends that no enforceable liens exist. The parties have cross-moved for summary judgment pursuant to Rule 56, Fed.R.Civ.P. Plaintiff's lien claim for the delivery in Saudi Arabia is dismissed for want of admiralty jurisdiction. Judgment is granted in plaintiff's favor, however, with respect to the fuel delivered in New York.

BACKGROUND

Defendant Central Gulf Lines, Inc. ("Central Gulf") is the owner of a vessel, the Green Harbour ex William Hooper (the "Hooper"). The Hooper was built in the United States with subsidies and financing provided by the federal government. She is classified by the American Bureau of Shipping, and flies the United States flag. Her port of registry is New Orleans, Louisiana.

The Hooper was chartered by a bareboat charter party to the Waterman Steamship Corporation ("Waterman"). Waterman used the Hooper in its U.S. flag common carrier service between ports in the United States and ports in the Middle East.

For forty years, plaintiff Exxon Corporation ("Exxon") was Waterman's exclusive worldwide supplier of gas and bunker fuel oil. Waterman and Exxon negotiated a marine fuel requirements contract in 1983. The unsigned document set minimum and maximum purchase limits. It provided that the fuel would be provided by the "Seller" (Exxon) or by "Supplying Companies, referred to in Seller's 'International Contract Price List for Marine Fuel Delivered as Ships' Bunkers.' " Exhibit 3 to Affidavit of James E. Sharkey.

When Waterman wished to make a purchase pursuant to this agreement, it telephoned Exxon, providing the details of the vessel to be bunkered and the place and approximate time of loading. Exxon would either effect delivery on its own, or direct its local supplier to deliver the bunkers to the vessel. Exxon would invoice Waterman for the fuel supplied, and if a local supplier was used, pay its supplier.

Apparently, Exxon did not rely on local suppliers when providing ships with fuel in New York. Exxon alleges that on October 7, 1983, it supplied the Hooper with 41.929 tons of gas oil in New York. Exxon invoiced Waterman for $13,241.63 on October 18, 1983.

Whenever Exxon procured bunker fuel for Waterman vessels at the port in Jeddah, Saudi Arabia, it used a local supplier, Arabian Marine Operating Co., Ltd. ("Arabian Marine"). The agreement controlling the relationship between Exxon and Arabian Marine provided that: "Exxon shall solicit and arrange for the sale of marine fuels to international customers having bunkering requirements at the port of Jeddah. Arabian Marine shall supply marine fuels to those customers nominated by Exxon." In return for Exxon's services, Arabian Marine agreed to pay Exxon a "commission." Under the terms of the agreement, Exxon would never actually own the fuel. "Title to all fuel delivered by Arabian Marine to the nominated customers solicited by Exxon will pass directly from Arabian Marine to the customer at the flange of the receiving vessel." Exhibit 4 to Affidavit of James E. Sharkey.

Around January, 1982, Arabian Marine began providing its customers with certain discounts at Jeddah. Since Exxon's company policy did not permit it to participate in this practice in Saudi Arabia, it suggested that Waterman make its own arrangements for price and supplies. Waterman elected to negotiate directly with Arabian Marine. Exhibit 4 to Affidavit of James E. Sharkey.

As of this time, Exxon was no longer involved in Waterman's purchase of bunkers in Jeddah. As a matter of courtesy to their long-time customer, Exxon allowed Waterman to use its communications system so that Waterman could more easily transmit its orders to Arabian Marine. Exxon was no longer informed of the specifics of these deliveries, and received no payments on account of them.

On September 29, 1983, Waterman placed an order with Arabian Marine for the delivery of bunker fuel to be delivered to the Hooper in Jeddah on October 25, 1983. In mid-October, 1983, Arabian Marine informed Exxon that, due to

Waterman's financial condition, it would no longer deal directly with Waterman, and suggested that the previous arrangement be restored. Exxon consented. On October 26, 1983, Arabian Marine delivered 4,242.47 tons of bunker fuel oil to the Hooper pursuant to the original agreement. Exxon was invoiced for this delivery on October 31, 1983. The invoice was paid by Exxon on November 15, 1983. Waterman was invoiced for $763,644.60 on November 8, 1983.

Waterman filed a Chapter 11 reorganization proceeding on December 1, 1983. On November 14, 1984, Exxon, Central Gulf, and Waterman reached an agreement under which Central Gulf consented to assume personal liability for the deliveries if this Court decides that the Hooper is liable *in rem* on account of the deliveries. Central Gulf also provided Exxon with a letter of credit as security for its promise.

A reorganization plan for Waterman was confirmed on June 19, 1986. It entitled Exxon to pursue this claim. Exxon has received, under the reorganization plan, certain cash and stock dividends. Exxon admits that its claim should be diminished by the amount that it receives under the reorganization plan.

DISCUSSION

Standard for Summary Judgment

A party seeking summary judgment must demonstrate that "there is no genuine issue as to any material fact." Fed.R. Civ.P. 56(c); *Knight v. U.S. Fire Insurance Company*, 804 F.2d 9, 11 (2d Cir. 1986), *cert. denied*, 480 U.S. 932, 107 S.Ct. 1570, 94 L.Ed.2d 762 (1987). "When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). It must demonstrate that there is a "genuine issue for trial." Id. at 587, 106 S.Ct. at 1356. "In considering the motion, the court's responsibility is not to resolve disputed issues of fact but to assess whether there

are any factual issues to be tried, while resolving ambiguities and drawing reasonable inferences against the moving party." *Knight* 804 F.2d at 11. The inquiry under a motion for summary judgment is thus the same as that under a motion for a directed verdict: "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202 (1986).

Choice of Law

Plaintiff Exxon contends that American law should govern whether maritime liens exist in this case. Defendant does not oppose this contention. I agree that this case should be decided according to American law. The United States has a significant interest in this case. The shipowner, the charterer, the ship, and the plaintiff were all American. On the other hand, Saudi Arabia has no interest in having its law apply in this case. The only foreign participant in this transaction, Arabian Marine, was not injured. *See Lauritzen v. Larsen*, 345 U.S. 571, 582-90, 73 S.Ct. 921, 928-32, 97 L.Ed. 1254 (1953); *Rainbow Line, Inc. v. M/V Tequila*, 480 F.2d 1024, 1026-27 (2d Cir.1973).

The Maritime Liens

Plaintiff Exxon claims that it is entitled to liens under Section 30, Subsec. P of the Federal Maritime Lien Act (the "Act"). The Act provides, in pertinent part:

> Any person furnishing . . . supplies . . . or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.

46 U.S.C.App. § 971.

Defendant Central Gulf denies the existence of the Saudi Arabia lien on three alternative grounds: (1) Exxon did not "furnish" the Hooper with bunker fuel in Jeddah; (2) Exxon's intervention in the Jeddah transaction was a response to Arabian Marine's request, not Waterman's "order"; and (3) Exxon did not rely on the credit of the Hooper. Defendant denies the existence of the New York lien on the ground that there is no proof that Exxon delivered gas to the Hooper in New York.

Among the cases cited by defendant in support of its contention that Arabian Marine, not Exxon, "furnished" the bunker fuel in Jeddah is *Peralta Shipping Corp. v. Smith & Johnson (Shipping) Corp.*, 739 F.2d 798 (2d Cir.1984), *cert. denied*, 470 U.S. 1031, 105 S.Ct. 1405, 84 L.Ed.2d 791 (1985). While defendant does not frame its argument in jurisdictional terms, I am persuaded that *Peralta* deprives me of admiralty jurisdiction over Exxon's Saudi Arabian claim. On the other hand, defendant's defense with respect to the New York delivery is meritless. Plaintiff is thus entitled to judgment on that claim.

The Saudi Arabian Delivery

A prerequisite to the existence of a maritime lien based on a breach of contract is that the subject matter of the contract must fall within the admiralty jurisdiction. *E.S. Binnings, Inc. v. M/V Saudi Riyadh*, 815 F.2d 660, 666 (11th Cir. 1987); *The Walter Adams*, 253 F. 20, 24 (1st Cir.1918) ("A contract cannot afford the necessary basis for a maritime lien, unless it is maritime in its nature, so as to be cognizable in admiralty . . . ."), *aff 'd sub nom. Piedmont & Georges Creek Coal Co. v. Seaboard Fisheries Co.*, 254 U.S. 1, 41 S.Ct. 1, 65 L.Ed. 97 (1920); G. Gilmore & C. Black, *The Law of Admiralty* § 9-20 (2d ed.1975) [hereinafter Gilmore & Black] ("To give rise to a lien a claim must be in first instance maritime. Thus we recur to the question of what is within the jurisdiction of the admiralty . . . ."); 7A J. Moore & A. Palaez, *Moore's Federal Practice* ¶ C.02 (2ded. 1988) (a "Court must act within its admiralty jurisdic-

tion in hearing" a proceeding to execute a maritime lien); *id.* ¶ C.03 ("Obviously to give rise to a maritime lien, the occurrence out of which the loss, injury or dispute arose must itself be maritime. That means that the occurrence must be within the admiralty jurisdiction of the United States as established by the Constitution and adopted by the Congress."); *id.* ¶ C.05 ("maritime liens may arise from the breach of contracts that are maritime in nature"); T. Schoenbaum, *Admiralty and Maritime Law*, § 3-2 (1987) (maritime liens are recognized only when the case comes within the admiralty jurisdiction); *c.f. United States v. Pacific Far East Lines, Inc.*, 809 F.2d 1435, 1437-38 (9th Cir.1987) (claims of employee association for loss of pay and benefits by shoreside employees were not maritime in nature and, consequently, could not give rise to a maritime lien.)

While admiralty jurisdiction provides "fairly complete coverage of the primary operational and service concerns of the shipping industry," there still exist "a few anomalous exceptions." Gilmore & Black § 1-10. One of these exceptions is the rule that agency contracts under which a party agrees to solicit or procure freight, passengers, crew, or supplies for a vessel are not maritime contracts. The Second Circuit in *Peralta Shipping Corp. v. Smith & Johnson (Shipping) Corp.*, 739 F.2d 798 (2d Cir.1984), *cert. denied*, 470 U.S. 1031, 105 S.Ct. 1405, 84 L.Ed.2d 791 (1985), recently refused to discard this exception. The *Peralta* court welcomed a reevaluation by the Supreme Court, but felt bound by the Court's ruling in *Minturn v. Maynard*, 58 U.S. (17 How.) 476, 15 L.Ed. 235 (1854). 739 F.2d at 804. The Supreme Court declined the Second Circuit's invitation to overrule *Minturn*. *Peralta Shipping Corp. v. Smith & Johnson (Shipping) Corp.*, 470 U.S. 1031, 105 S.Ct. 1405, 84 L.Ed.2d 791 (1985) (Brennan, Marshall & Blackmun, JJ., would have granted certiorari).

The defendant in *Peralta* was hired as the husbanding agent for vessels calling on certain ports, and provided services such as arranging for fuel, water, provisions, customs clearance, and stevedoring. For the most part, the defendant employed others to perform services on the vessel, although

at the port of New Orleans, the defendant "hired" itself to act as stevedore. The Second Circuit found that the defendant performed merely "preliminary" services leading to a maritime contract, not cognizable in admiralty. Quoting an early Southern District case, *The Thames*, 10 F. 848 (S.D.N.Y.1881), the Court of Appeals explained:

> The distinction between preliminary services leading to a maritime contract and such contracts themselves have been affirmed in this country from the first, and not yet departed from. It furnishes a distinction capable of somewhat easy application. If it be broken down, I do not perceive any other dividing line for excluding from the admiralty many other sorts of claims which have a reference, more or less near or remote, to navigation and commerce. If the broker of a charter-party be admitted, the insurance broker must follow,—the drayman, the expressman, and all others who perform services having reference to a voyage either in contemplation or executed.

739 F.2d at 801-02. The court explicitly declined to circumvent *Minturn* by distinguishing it or carving exceptions out of its rule. It rejected, for example, the notion that services necessary for a continuing voyage fall within admiralty jurisdiction. *Id.* at 803 & n. 4. The court held to its previous holdings that agency contracts are not maritime in nature.

Applying the principles enunciated in *Peralta* to the facts at hand, it is evident that Exxon's arrangement to procure fuel for the Hooper in Saudi Arabia was not a maritime contract. Admittedly, Exxon's contract with Waterman is not called an "agency contract." Indeed, it refers to Exxon as a "seller," not a procurer, of marine fuel. Yet "the focus of our inquiry must not be on the name assigned to the contract, but rather on the nature of the services to be performed." *Ingersoll Milling Machine Co. v. M/V Bodena*, 829 F.2d 293, 302 (2d Cir.1987), *cert. denied*, ____ U.S. ____, 108 S.Ct. 774, 98 L.Ed.2d 860 (1988).

Under the contract, Exxon served in two distinct capacities. Its first role was as a supplier of marine fuels. When Water-

man vessels called at ports where Exxon maintains its own bunker stations, Exxon promised to physically deliver the bunkers. When the vessels, however, called at ports where Exxon depends on local suppliers, Exxon promised to arrange for the local suppliers to provide Waterman ships with fuel. When acting in this latter capacity, Exxon was merely Waterman's agent.

Exxon wore its agency hat when it procured bunkers for the Hooper in Jeddah. Its services with respect to the Jeddah delivery included taking Waterman's order, contacting Arabian Marine, maintaining a bunkers contract with Arabian Marine, and advancing Waterman the purchase price by paying Arabian Marine. It never actually possessed the fuel that was supplied to the Hooper at Jeddah. Indeed, pursuant to Exxon's contract with Arabian Marine, title to the fuel passed directly from Arabian Marine to the Hooper. In return for these services, Exxon received a commission which was deducted from Arabian Marine's invoice to Exxon. In sum, Exxon's role in the transaction was strictly "shoreside," *E.S. Binnings*, 815 F.2d at 664. As Exxon put it in its discussion of the choice of law issue, the locus of Exxon's relationship with Waterman was the United States, not the dock in Jeddah. *See* Plaintiff's Memorandum of Law at 16. Exxon's services were thus "preliminary"; they ended before the bunkers reached the Hooper.

Peralta did not involve the Federal Maritime Lien Act, and the court left open the question of whether the agency contract exception applies to suits brought under the Act. *See Peralta*, 739 F.2d at 800 & n. 2 ("Congress [through the Federal Maritime Lien Act] has expressly included certain transactions or events within admiralty.") It is well-settled, however, that Congress did not intend to expand admiralty jurisdiction through the Act. In *E.S. Binnings*, the Eleventh Circuit addressed the question of whether "a maritime lien can arise and be enforced under the [Act] although the underlying contact would not be considered maritime." 815 F.2d at 666. The court concluded that although Congress "may extend the admiralty jurisdiction to areas not formerly included within it," there is "no indication . . . that the

[Act] was intended to enlarge the admiralty jurisdiction to include agency contracts." *Id.* Indeed, shortly after the Act was adopted, Justice Brandeis, quoting the legislative reports, declared that the Act "makes no change in the general principles of the present law of maritime liens." *Piedmont & Georges Creek Coal Co. v. Seaboard Fisheries Co.*, 254 U.S. 1, 11, 41 S.Ct. 1, 4, 65 L.Ed. 97 (1920); *see also New Bedford Dry Dock Co. v. Purdy*, 258 U.S. 96, 98-99, 42 S.Ct. 243, 244, 66 L.Ed. 482 (1922) (party claiming lien under the Act must establish that agreement was maritime in that it involved repairs, not original construction). Professors Gilmore and Black are quite clear on this point: "*Assuming its maritime nature,* almost any type of service claim will today be held within the Lien Act. . . ." Gilmore & Black § 9-35 (emphasis added).

Exxon's attempt to distinguish this case from the agency contract cases must be rejected. While it is true that *Peralta* involved a general agency, and that there are *dicta* that agents who arrange for the supply of bunkers may sue in admiralty, *see, e.g., Tramp Oil & Marine Ltd. v. M/V Mermaid I*, 630 F.Supp. 630, 633 (D.Puerto Rico) ("Exxon and Colonial, as direct suppliers, would be the ones entitled to the protection of the maritime lien provisions of section 971."), *aff'd* 805 F.2d 42 (1st Cir.1986) ("Exxon . . . caused Colonial . . . to supply the oil to the Mermaid. . . . No one disputes that Exxon and Colonial as direct suppliers of the fuel to the Mermaid would be entitled to a maritime lien."), any distinction between a husbanding agent and a bunkering agent is untenable. "[I]t would be anomalous to hold that a general agency agreement" to, among other things, arrange for fuel supplies "is outside admiralty, while an agreement between a principal" and an agent who has procured bunkers for the vessel "falls within the grant of jurisdiction." *See Continental Cameras Co. v. FOA & Son Corp.*, 658 F.Supp. 287, 289 (S.D.N.Y.) (Sand, J.) (insurance broker), *aff 'd* 831 F.2d 45 (2d Cir.1987) (per curiam); *see also Boyd, Weir & Sewell, Inc. v. Fritzen-Halcyon, Lijn, Inc.*, 709 F.Supp. 77 (S.D.N.Y.1989) (Cannella, J.) (chartering agent).

As a way of getting around the jurisdictional difficulty in this case, it might be argued that Exxon furnished the Hooper with the credit it needed to obtain the fuel, and thus was not a mere agent. That Exxon advanced the Hooper needed cash is admitted by Central Gulf. Defendant's Memorandum of Law at 19-20 ("Exxon acted, as a guarantor of payment under the bunkering agreement . . ."). Defendant suggests, however, that a lien claimed by virtue of Exxon's extension of credit would arise only by subrogation, and would be governed by Saudi Arabian law. *See* Defendant's Memorandum of Law at 7-9. Although this may not be the case, *see Universal Shipping v. The Panamanian Flag Barge*, 563 F.2d 483, 484 (1st Cir.1976) (*dictum* distinguishing lien arising by subrogation when advance is given to discharge an existing lien from lien arising when advance is made for the purpose of permitting vessel to purchase other necessaries), plaintiff has not claimed a lien on the ground that it advanced the Hooper the funds needed to refuel, *see* Plaintiff's Reply Memorandum at 14. Moreover, the *Minturn* case itself involved a general agent who had "laid out" and "expended" funds for the ship "in paying for supplies." The Court nevertheless concluded that there was "nothing in the nature of a maritime contract in the case." *Minturn*, 58 U.S. at 477.

Although this Court has construed the Federal Maritime Lien Act broadly to further its "stated purpose of fostering marine commerce," *Itel Containers International v. Atlantrafik Express Service*, 668 F.Supp. 225, 230 (S.D.N.Y.1987) (Carter, J.), I cannot disregard the advice of the Second Circuit that creating exceptions to the agency contract rule based on "hairsplitting distinctions would blur, if not obliterate, a rather clear admiralty distinction." *Peralta*, 739 F.2d at 804. I therefore hold that Exxon's agreement to procure fuel for the Hooper at Jeddah falls outside of the admiralty jurisdiction of this Court. Since a maritime lien under Section 971 cannot arise out of nonmaritime contracts, Exxon's claim for a $763,644.60 lien for the Jeddah fuel delivery is dismissed.

The New York Delivery

Exxon was the supplier, not agent, with respect to the New York delivery. Its $13,241.63 claim therefore falls within the admiralty jurisdiction. Central Gulf's only defense with respect to this delivery is that Exxon has failed to prove it. I find that there is no genuine issue of material fact as to the existence of the New York delivery, and grant summary judgment in plaintiff's favor on this claim.

"In order for a contract to be within the admiralty jurisdiction, either it must be wholly maritime or its nonmaritime elements must be insubstantial or separable." *E.S. Binnings*, 815 F.2d at 665. "The substantial question is whether the maritime obligations can be separately enforced without prejudice to the rest." *Compagnie Francaise de Navigation a Vapeur v. Bonnasse*, 19 F.2d 777, 779 (2d Cir.), *cert. denied*, 275 U.S. 551, 48 S.Ct. 114, 72 L.Ed. 421 (1927).

The contract between Exxon and Waterman can be divided into the separate fuel orders. Each delivery was a separate occurrence; Exxon sent Waterman a separate bill for each transaction. Moreover, the deliveries could be divided into two groups: a first, in which Exxon relied on local suppliers to provide Waterman ships with the bunkers; and a second, in which Exxon delivered its own fuel to the vessels.

Central Gulf has failed to produce any credible evidence controverting Exxon's contention that it delivered bunkers to the Hooper in New York, and the evidence submitted by Exxon is sufficient to warrant summary judgment in its favor. Central Gulf admits that around October 7, 1983, the Hooper requested Exxon to supply it with fuel in New York. It claims however, that the "bunkers were, in fact, delivered to the vessel by a supplier other than Exxon." Affidavit of Francis A. Montbach ¶ 6. Apparently, Central Gulf's belief that Exxon did not deliver the fuel is based on Exxon's failure "to produce even the most crucial piece of evidence; the delivery receipt." Central Gulf's Reply Memorandum at 16. Exxon admits that "no bunker receipt . . . has been found despite a diligent search." Exxon's Reply Memorandum at 2, but has supplied the Court with affidavits asserting that the

delivery took place. Adam Rudzki, a Credit Manager at Exxon, disputes that "the fuel oil delivered to the WILLIAM HOOPER in New York on January 7, 1983 was made by an entity other than Exxon," and swears that the delivery "was made by Exxon Company, U.S.A. which was then, and still is, an unincorporated division of Exxon Corporation." To this defendant responds that "Mr. Rudzki, who is not a marine salesman, . . . must have obtained such knowledge from business records kept by Exxon." Central Gulf's Reply Memorandum at 16. Yet James Sharkey, who *is* a marine salesman for Exxon, also swears that "[i]n accordance with [the Hooper's] request, Exxon delivered the gas oil in question and subsequently invoiced Waterman (and the vessel) for this." Affidavit of James E. Sharkey ¶ 12. Ironically, the only affidavit that defendant submits to dispute Exxon's evidence is that of Francis Montbach, the attorney who represents Central Gulf in this litigation, and who has no personal knowledge of the transaction.

If this evidence were to be submitted at trial, no reasonable jury could find in favor of defendant. "Rule 56(e) . . . requires the nonmoving party to go beyond the pleadings and by her own affidavits or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.' " *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). Central Gulf has failed to overcome Exxon's proof of delivery with evidence of its own. At most, it has raised no more than a "metaphysical doubt" as to the delivery in New York. *Matsushita*, 475 U.S. at 586, 106 S.Ct. at 1356. A trial is not warranted on this issue. Summary judgment is granted in plaintiff's favor as to its claim for a $13,241.63 lien with respect to the New York delivery.

CONCLUSION

For the reasons stated above: (1) plaintiff's claim for a lien of $763,644.60 with respect to the Jeddah delivery is denied for lack of admiralty jurisdiction; and (2) plaintiff's claim for

a lien of $13,241.63 with respect to the New York delivery is granted. In accordance with Exxon's agreement with Central Gulf, plaintiff's recovery will be reduced by certain amounts Exxon received under the reorganization plan. Settle judgment on two weeks' notice.

SO ORDERED.

Appendix D

AGA Progas a s
AT&S Exploration Ltd.
Abu Dhabi Company for Onshore Oil Operations
Abu Dhabi Petroleum Company Limited
Ace Polymer Co., Ltd.
Aditivos Orinoco, C.A.
Adria-Wien Pipeline Gesellschaft
mit beschrankter Haftung
Aircraft Fuel Supply B.V.
Aishin Sekiyu K.K.
Alberta Products Pipe Line Ltd.
Al-Jubail Petrochemical Company
Altona Petrochemical Company Limited
Alyeska Pipeline Service Company
Arabian American Oil Company Aramco
Aramco Overseas Company
Aramco Services Company
Aromatics (Thailand) Company Limited, The
Asakawa Sekiyu K.K.
Atlas Supply Company of Canada Limited
Australian Synthetic Rubber Company Limited
Aviation Services Saudi Arabia Limited
Awaji Gas Nenryo Kabushiki Kaisha
Azuma Sekiyu K.K.

BEB Erdgas und Erdoel GmbH, BEB
Hannover
BT Asia
B.W.O.C., Inc.
Bangkok Aviation Fuel Services Limited
Banshu Ekika Gas K. K.
Bardwell SA/NV
Bayerische Erdgasleitung G.m.b.H.
Beaverhill Resources Limited
Bel-Air Entreposage S. A.
BRIGITTA Erdgas und Erdoel GmbH. Brigitta
Hannover

Bryan Woodbine Gathering Inc.
Byron Creek Collieries (1983) Limited

Canadian Reserve Oil & Gas Ltd.
Carlew Inc.
Carlisle SA/NV
Carnduff Gas Limited
Cary Chemicals, Inc.
Cascade Fertilizers (1990) Limited
Castle Peak Power Company Limited
Champlain Oil Products Limited
Changi Airport Fuel Hydrant Installation
Pte. Ltd.
Chinchaga Resources Limited
Chuo Sekiyu Hanbai K.K.
Clermont Coal Mines Limited
Comcor Chemicals Limited
Commercial Polymers Pty. Ltd.
Compania de Operaciones Portuarias Limitada
Compania Minera Disputada de Las Condes S.A.
Comptoir Auxiliaire du Petrole
Comptoir Oyonnaxien des Combustibles
Computer Centrum Groningen B.V.
Cynthia Gas Gathering Company Limited

DFTG Deutsche Fluessigerdgas Terminal GmbH
Daihatsu Sekiyu K.K.
Daiichi Kouyu K.K.
Daito Gas K.K.
Demulsificantes Del Orinoco, C.A. DEMORCA
Depot Petrolier du Gresivaudan
Depots de Petrole Cotiers
Depots Petrolier de la Corse
Deudan-Holding GmbH
Deutsche Erdgas Transport G.m.b.H.
Deutsche Transalpine TAL-Germany
Oelleitung G.m.b.H.
Devon Estates Limited
Divafi Pty. Limited

Dixie Pipeline Company
Dukhan Service Company

ERC Malaysia Inc.
E S F Limited
Eagle Kenso K.K.
East Texas Salt Water Disposal Company
Eastcoast Spill Response Inc.
Eiko Sekiyu K.K.
Elwerath Erdgas und Erdoel GmbH, Elwerath Hannover
Elwerath Erdoel und Erdgas AG
Emirates Chemicals Company
Emori Sekiyu K.K.
Emsland-Erdoelleitung G.m.b.H.
Energie Marketing Service GmbH
Entrepot Petrolier de l'Aveyron (E.P.A.)
Entrepot Petrolier de Mulhouse (E.P.M.)
Erdgas-Verkaufs-Gesellschaft m.b.H
Esso Chemical Alberta Limited
Esso Energie G.I.E.
Esso Exploration and Production Angola, Inc.
Esso Exploration and Production Ireland Limited
Esso Malaysia Berhad
Esso of Canada Limited
Esso (Overseas) Pension Trust Limited
Esso Portuguesa, S.A.
Esso Resources Canada an Alberta limited partnership
Esso Resources Canada Limited
Esso Resources Enterprises Ltd.
Esso Resources N.W.T. Limited
Esso Resources (1989) Ltd.
Esso Resources Properties Inc.
Esso Resources Ventures Limited
Esso Societe Anonyme Francaise Esso France/ESAF
Esso Standard Algerie S. A.
Esso Standard Tunisie S. A.
Esso Technologies et Services (E.T.S.)

Etablissements Cloarec
Exact Reisebyra A/S
Exxon Chemical Pakistan Limited
Exxon de Colombia S.A.
Exxon Supply Company

F.T. Giken Kabushiki Kaisha
Federated Pipe Lines Ltd.

Gasunie Engineering B.V.
General Bussan K.K.
General Highway K.K.
General Petrochemical Industries Limited
General Sekiyu K.K. GSK
General Sekiyu Okinawa Hanbai K.K.
General Sekiyu Overseas, Ltd.
General Shipping Co. Ltd.
General Unyu Kabushiki Kaisha
Geobutane—Lavera
Gewerkschaft Brassert Erdoel und Erdgas GmbH
Gewerkschaft Erdoel-Raffinerie Deurag-Nerag
Gewerkschaft Gute Hoffnung Erdgas and Erdoel GmbH
Gewerkschaft Kuechenberg Erdgas und Erdoel GmbH
Glen Park Gas Pipe Line Company Limited
Grande Ecaille Land Company, Inc.
Great Eastern Oil Limited
Groupement d'Exploitation du Depot de Reception de Chennevieres (G.E.D.R.C.)
Groupement Immobilier Petrolier
Groupement Liants Routiers du Gard Esso-ViaFrance (G.L.R.G.E.V.)
Groupement Petrolier Aviation
Groupement Petrolier de la Cote Azur
Groupement Petrolier de Nantes (G.P.N.)
Groupement Petrolier du Finistere G.I.E.

Hamburger Geswerke GmbH
Hannoversche Erdoelleitung G.m.b.H.
Hanshin Kyowa Sekiyu K.K.

Hayakawa Sekiyu K.K.
Heinrich Schneider Spedition GmbH
Hiroshima General Gas Juten Kabushiki Kaisha
Hoei Sekiyu K.K.
Hokushin Bussan K.K.
Hokuyu Sekiyu K.K.
Home Energy Company Ltd.
Home Oil Company Limited
Hong Kong Pumped Storage Development Company, Limited
Houston Regional Monitoring Corporation
Hydranten-Betriebsgesellschaft
Hydrierwerke Poelitz Aktiengesellschaft

Imperial Oil Limited Imperial
Imperial Pipe Line Company, Limited, The
Inada Ekka Gas Kabushiki Kaisha
Industria Acqua Siracusana S.p.A.
Industry Promotion Enterprises Limited
Intamix Corporation
Interhome Energy Inc.
Interprovincial Pipe Line (Alberta) Ltd.
Interprovincial Pipe Line (NW) Ltd.
Intoplane Service Company Limited
Iranian Oil Participants Limited Iranian Consortium
Iranian Oil Services (Holdings) Limited
Iranian Oil Services Limited
Iraq Petroleum Company, Limited IPC
Iraq Petroleum Pensions, Limited

Japan Butyl Company Limited
Japan Coal Liquefaction Development Company, Ltd.
Jersey Nuclear-Avco Isotopes, Inc.

K.K. Aizu General
K.K. Chubu Toresen
K.K. Daimaru
K.K. General Sekiyu Hanbaisho

K.K. Genetech
K.K. Heian Sekiyu
K.K. ito
K.K. Kanagawa Sekiyu Shokai
K.K. Kyoei Agnecy
K.K. Kyoei Shosha
K.K. Kyowa Sekiyu Service
K.K. Marugo Izumasa Shoten
K.K. Marutaka Sekiyu
K.K. Momose Sekiyu
K.K. Nippatsu
K.K. Standard Sekiyu Osaka Hatsubaisho
K.K. Toko
K.K. Toresen
K.K. Uwano Sekiyu Shokai
K/S Statfjord Transport A/S & Co.
Kabushiki Kaisha Sankyo Plastics
Kai Tak Refuellers Company Limited
Kanto Kygnus Sekiyu Hambai K.K.
Karlsruhè-Stuttgart Rohrleitung Gesellschaft mbH
Kawasaki Kygnus Sekiyu Hambai Kabushiki Kaisha
Keihan Sekiyu K.K.
Keiyo Sekiyu Hanbai K.K.
Kenya Petroleum Refineries Limited
Kibo Sekiyu Hanbai K.K.
Kimura Sekiyu Kabushiki Kaisha
Kinwa Sekiyu K.K.
Kobe Standard Sekiyu K.K.
Kowa Sekiyu K.K.
Kowloon Electricity Supply Company Limited
Kumho E.P. Rubber Co., Ltd.
Kygnus Ekka Gas Kabushiki Kaisha
Kygnus Kosan Kabushiki Kaisha
Kygnus Marketing Service K.K.
Kygnus Sekiyu K.K.
Kygnus Sekiyu Seisei Kabushiki Kaisha
Kyushu Eagle K.K.

L12a (Groep) B.V.
L12b/L15b (Groep) B.V.
L15a (Groep) B.V.
LPL Investments, Inc.
La Societe Acadienne de Recherches Petrolieres
Lakehead Pipe Line Company, Inc.
LEAG Aktiengesellschaft fuer luzernisches Erdoel
Les Docks des Petroles d'Ambes
Lilac Sekiyu Kabushiki Kaisha
Long Beach Oil Development Company

Maasvlakte Coal Terminal B.V.
Maasvlatke Olie Terminal N.V.
Magota Sekiyu K.K.
Mainline Pipelines Limited
Manito Pipelines Ltd.
Maple Leaf Petroleum Limited
Maruei Gas K.K.
Maruei Service K.K.
Marugo Gas K.K.
McColl-Frontenac Inc.
McColl-Frontenac Oil Co. Ltd.
MEGAL FINCO
MEGAL GmbH
Meiji Sekiyu K.K.
MESBIC Financial Corporation of Houston
Metro Fuel Co. Ltd.
Mikawa Bussan K.K.
Minerals Limited
Mittelrheinische Erdgas Transport
Gesellschaft mit beschraenkter Haftung
Montreal Pipe Line Limited/
Les Pipe-Lines Montreal Limitee
Mount Thorley Coal Loading Limited
Mr. Lube Canada Inc.
Mytex Polymers Incorporated

NAM - K 7 B.V.
NAM - K 14 B.V.

NAM - K 15 B.V.
NAM-17 B.V.
NAM/CLOMS - K 8/K 11 B.V.
NAM/CLOMS - L 13 B.V.
NAM/MOBIL M9a B.V.
NPC Services, Inc.
N. V. Nederlandse Gasunie Gasunie
Nakabayashi Sekiyu K.K.
Nansei Oil Terminal K.K.
Nansei Sekiyu Kabushiki Kaisha
Nanseki Kaihatsu K.K.
Native Venture Capital Co. Ltd.
Near East Development NEDC
Corporation
Nederlandse Aardolie NAM
Maatschappij B. V.
Neptune Bulk Terminals (Canada) Ltd.
Nichiel Kogyo Kabushiki Kaisha
Nichimo Oil (Bermuda) Co., Ltd.
Nikko Sangyo K.K.
Nippon Unicar K.K.
Nisku Products Pipe Line Company Limited
Nissei Sekiyu Kabushiki Kaisha
Nogat B.V.
Norddeutsche Erdgas-Aufbereitungs G.m.b.H.
Norddeutsche Mineraloelwerke Stettin G.m.b.H.
Nordrheinische Erdgas Transport Gesellschaft
mit beschrankter Haftung
Noroxo
Northward Developments Ltd.
Nottingham Gas Limited

107580 Canada Inc.
151742 Canada Inc.
159129 Canada Inc.
150440 Canada Limited
160837 Canada Limited
165548 Canada Limited
165549 Canada Limited

165550 Canada Limited
165899 Canada Limited
168211 Canada Limited
Office Prive d' Assurances et de Courtages
Offshore Medical Support Limited
Oil Field Chemicals Company (Saudi Arabia) Ltd.
Oil Service Company of Iran (Private Company)
Oil Spill Response Limited
Oil Transport Company (Saudi Arabia) Limited
Oldenburgische Erdoel Gesellschaft m.b.H.
OSLO Alberta Limited
Osaka Ashyu Nenryou K.K.
Osaka Propane Gas Hambai Kabushiki Kaisha
Osaka Sekiyu Gas Yuso K.K.

P.A.C. S.A.R.L. (Pinson-Allegret-Causco)
P.T. Stanvac Indonesia
Pars Investment Corporation
Peninsula Electric Power Company Limited
Petroleum Refineries (Australia) Proprietary Limited
Petroleum Services (Middle East) Limited
Petrosvibri S.A.
Pioneer Kosan Kabushiki Kaisha
Pipe Line Services, Inc.
Plantation Pipe Line Company
Portland Pipe Line Corporation
Primaer Oel GmbH
Progas Limited

Raffinerie du Midi S.A.R.L.
Rainbow Pipe Line Company, Ltd.
Redwater Water Disposal Company Limited
Refineria Petrolera Acajutla, S. A.
Regulus Holding (Singapore) Pte. Ltd.
Rheingas Erdgasleitungs-Gesellschaft m.b.H.
Rochevert Inc.
Rotterdam Antwerpen Pijpleiding (Belgie)

Rotterdam-Antwerpen Pijpleiding (Nederland) N.V.
Ruhrgas Aktiengesellschaft

S.A. du Pipeline a Produits Petroliers sur Territoire Genevois (SAPPRO)
S.A.R.L. Viain
Saitama Sekiyu Hanbai K.K.
Sanyo Sekiyu K.K.
Saraco S. A.
Saudi Arabian Lube Additives Company Limited
Schubert KG
Scurry-Rainbow Oil Limited

204383 Enterprises Limited
363011 Alberta Limited
369772 Alberta Inc.
393193 Alberta Inc.
TAR-Tankanlage Rumlang AG
TBN Tanklager-Betriebsgesellschaft Nuernberg mbH
TGF Tankdienst Gesellschaft Frankfurt
TGM Tankdienst Gesellschaft Munchen
Taglu Enterprises Limited
Taihei Bussan K.K.
Taisei Kogyo Sekiyu Hanbai K.K.
Takahama Kosan Kabushiki Kaisha
Taketsura Yugyo K.K.
Tankanlage A.G. Mellingen
Tanklager Altishausen A.G.
Tanklager Gesellschaft, Koln
Tanklager-Gesellschaft Tegel
Tanklager Lechelles I S.A.
Tanklager Taegerschen AG
Tecnica Quimica Petrolera, S.A. de C.V.
Tecumseh Gas Storage Limited
Texaco Canada Malaysia Inc.
Thai Aliphatics Company Limited
THUMS Long Beach Company
Thyssengas G.m.b.H. Thyssengas
TIBA Speditions GmbH

Tohko Plastics Company, Limited
Tohpren Co., Ltd.
Tojo Gas K.K.
Toko Sekiyu K.K.
Tonen Energy and Marine (Singapore) Pte. Ltd.
Tonen Energy International Corp.
Tonen Kabushiki Kaisha
Tonen Properties Inc.
Tonen Sekiyukagaku Kabushiki Kaisha
Tonen Sogo Service Co., Ltd.
Tonen System Plaza Kabushiki Kaisha
Tonen System Service Kabushiki Kaisha
Tonen Tanker Kabushiki Kaisha
Tonen Tapyrus Company Limited
Tonen Technology K.K.
Tonex Company Limited
Tophus Quen Pty. Ltd.
Towa Compounding Co., Ltd.
Towa Sekiyu K.K.
Toyoshina Film Company, Ltd.
Transalpine Oelleitung in TAL-Austria
Oesterreich Gesellschaft m.b.H.
Trans-Arabian Pipe Line Company Tapline
Trans-Northern Pipelines Inc.
Transgaz Lavera
Trimin Resources Inc.
Tsurumaru Unyu K.K.
Turkish Petroleum Company, Limited

UBAG - Unterflurbetankungsanlage Flughafen Zurich
Ulan Coal Mines Limited
Ulan Coal Shippers Pty. Limited
United Collieries Pty. Limited
United Industry Development

Van Salt Water Disposal Company

W.A.G. Pipeline Proprietary Limited
Wako Jushi Kabushiki Kaisha

Wako Kasei Kabushiki Kaisha
Warmtepomp Nederland B.V.
Westdeutsche Erdoelleitungs-G.m.b.H.
Westgas G.m.b.H.
Winnipeg Pipe Line Company Limited
Worex S.N.C.

Yasaka Sekiyu K.K.
Yellowstone Pipe Line Company
Yoshiki Sekiyu Kabushiki Kaisha
Yoshimi Gas Kabushiki Kaisha
Yuai Sekiyu K.K.
Yugen Kaisha Nishi Kobe Bosai Center

No. 90-34

AUG 2 1990

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

EXXON CORPORATION,

Petitioner,

—v.—

CENTRAL GULF LINES, INC., *in personam*, and the M/V GREEN HARBOUR (ex WILLIAM HOOPER) *in rem*, her engines, boilers, tackle, etc. and a certain Letter of Credit No. P 621208 dated December 26, 1984 issued by the Chase Manhattan Bank, N.A., *in rem*,

Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

FRANCIS A. MONTBACH
Counsel of Record

KARIN A. SCHLÖSSER

BIGHAM ENGLAR JONES & HOUSTON
Counsel for Respondents
14 Wall Street
New York, New York 10005
(212) 732-4646

August 2, 1990

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Is there a conflict between the District Court's decisions, as affirmed by the Court of Appeals for the Second Circuit, with regard to admiralty jurisdiction over a claim of a general agent for shoreside services, and the decisions of the Fifth and Ninth Circuits?

2. Should this Court overrule or limit its opinion in *Minturn v. Maynard*, 58 U.S. (17 How.) 477 (1854), which denied admiralty jurisdiction to an agent, in order to benefit Exxon?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

EXXON CORPORATION,

Petitioner,

—against—

CENTRAL GULF LINES, INC., *in personam*, and the M/V GREEN HARBOUR (ex WILLIAM HOOPER) *in rem*, her engines, boilers, tackle, etc. and a certain Letter of Credit No. P 621208 dated December 26, 1984 issued by the Chase Manhattan Bank, N.A., *in rem*,

Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STATEMENT

Respondent, Central Gulf Lines, Inc., respectfully requests that this Court dismiss the Petition for a Writ of Certiorari herein, for the reasons that follow.

FACTUAL STATEMENT OF THE CASE

I. The Facts

The United States flag vessel, M/V GREEN HARBOUR (ex WILLIAM HOOPER) ("the vessel"), was owned by

respondent, Central Gulf Lines, Inc. ("Central Gulf") which had chartered the vessel to Waterman Steamship Corporation ("Waterman") under a 12-year bareboat charter party. Waterman employed the vessel for common carriage of goods in its American flag fleet between various ports in the United States and the Middle East, including Jeddah, Saudi Arabia (A-4, A-5, A-23, A-24).

Exxon Corporation ("Exxon") and Waterman had, for almost 40 years, been parties to an agreement pursuant to which Exxon procured supplies of bunker fuel for Waterman on an exclusive worldwide basis. Under this agreement, Exxon was to either (1) supply fuel directly in those ports where Exxon maintained its own bunker fuel facilities, or (2) arrange supplies through local suppliers in those ports where Exxon could not supply Waterman's vessels directly. To facilitate Waterman's payments for these supplies, Exxon extended an extensive credit line to Waterman (A-4, A-5, A-23, A-24).

In order to supply its customers with fuel in Jeddah, Saudi Arabia, Exxon entered into an agreement with a local supplier, Arabian Marine. Pursuant to this agreement, Exxon was to solicit and arrange for the sale of marine fuel by Arabian Marine to vessels having bunkering requirements at the port of Jeddah. In return for its services, Exxon received a commission. It was explicitly stated in the Exxon/Arabian Marine agreement that title to fuel supplied by Arabian Marine would pass directly from Arabian Marine to the customer receiving such fuel (A-5, A-6, A-24).

On October 26, 1983 Arabian Marine supplied fuel to the vessel and subsequently invoiced Exxon, giving Exxon a credit for the commission earned (A-9). Exxon, in turn, invoiced Waterman for the full value of the fuel supplied, including the commission. Thereafter, Waterman filed for protection pursuant to Chapter XI of the Bankruptcy Act (A-25).

II. The Proceedings Below

Although respondent agrees with the petitioner's general outline of the proceedings below, petitioner's synopsis of the conclusions of the District Court warrants correction and clarification. The District Court's conclusion that Exxon's claim was not within the Court's admiralty jurisdiction only partially relied upon this Court's decision in *Minturn v. Maynard*, 58 U.S. (17 How.) 477 (1854), as followed by the Second Circuit in *Peralta Shipping Corp. v. Smith & Johnson (Shipping) Corp.*, 739 F.2d 798 (2d Cir. 1984), *cert. denied*, 470 U.S. 1031 (1985), *reh'g denied*, 471 U.S. 1112 (1985). More importantly, the District Court found that the services rendered by Exxon constituted shoreside preliminary services and, thus, were outside of admiralty jurisdiction. In so doing, the District Court gave great weight to the terms and conditions of the Exxon/Arabian Marine supply contract, in accordance with which Exxon was to solicit customers and receive a commission, without the title of ownership of the fuel passing to Exxon (A-24, A-30, A-5, A-9, A-17). This conclusion, strengthened by the *Minturn* holding that an agency contract is considered non-maritime, led the District Court to decide that Exxon's claim did not fall within the Court's admiralty jurisdiction, a finding which was affirmed by the United States Circuit Court for the Second Circuit.

REASONS FOR DENYING THE WRIT

I. The District Court decisions, based in part upon *Peralta* and *Minturn*, are not in conflict with the decisions of the Fifth, Ninth or Eleventh Circuits.

The Fifth Circuit in *Hadjipateras v. Pacifica, S.A.*, 290 F.2d 697 (5th Cir. 1961) held that admiralty jurisdiction extended to a suit by the owners of a vessel against her managing agent for breach of a contract pursuant to which the managing agent was to "*operate the vessel*, obtain freight or freight engagements, collect the freight monies, and after deducting all *operating expenses*, remit the balance to the

owners." *Hadjipateras, supra*, at p. 700 (emphasis added). Such an operating contract is distinguishable from the Exxon/Waterman contract which provided solely for the procurement of bunkers. As found by the District Court, Exxon's role in the transaction was strictly shoreside, ending before the bunkers reached the vessel (A-30). Indeed, Exxon does not claim that it "operated" the vessel. Moreover, the agency contract in *Hadjipateras* can also be distinguished from the agency contract in *Peralta* where, in the former, the agent was to act as managing agent for one vessel for a stated period of time, while in the latter, the sub-agent was to perform services for all vessels that the company operated within an extended multi-port area over an extended time period.

The Ninth Circuit, in *Hinkins Steamship Agency, Inc. v. Freighters, Inc.*, 351 F. Supp. 373, aff'd 498 F.2d 411 (9th Cir. 1974), extended admiralty jurisdiction to a husbanding agent which made various arrangements for one vessel in one particular port for one call. In the case at bar, the District Court emphasized the long-standing relationship between Exxon and Waterman (A-12, A-13, A-20, A-23). In *Hinkins*, the District Court implied that it would not have granted admiralty jurisdiction had the case involved "a continuing relationship," 351 F. Supp. at 375. Thus, the *Hinkins* decision cannot be said to conflict with *Peralta* or the case at bar. Application of the *Hinkins* criteria to Exxon's claim would, in all likelihood, have resulted in a denial of admiralty jurisdiction.

Bearing in mind the factual differences in the contractual agreements involved in the cases decided in the Fifth, Ninth and Second Circuits, the standard for determining whether an agent's claim falls within admiralty jurisdiction, as applied by the District Court below, is not in conflict with the standards applied by the Fifth and Ninth Circuits. Moreover, the District Court's finding that Exxon's role was strictly "shoreside" and thus preliminary, makes it unnecessary for this Court to address the question of *Minturn*'s viability.

Finally, the Eleventh Circuit, by petitioner's own admission, is *not* in conflict with the Second Circuit. The Eleventh Circuit Court of Appeals, in *E.S. Binnings, Inc. v. M/V SAUDI RIYADH*, 815 F.2d 660 (11th Cir. 1987), adopted the Second Circuit's view of *Minturn*. More recently, the Eleventh Circuit reaffirmed that, as a general rule, certain landside marine support services, including the procurement of supplies, are preliminary services not cognizable in admiralty, *Nehring v. Steamship M/V POINT VAIL*, 901 F.2d 1044, 1049 (11th Cir. 1990).

II. Overruling or limiting *Minturn* would not benefit the uniformity of Maritime law nor would it increase protection for suppliers of necessaries to vessels.

In *Minturn*, this Court established a general demarcation as to what contracts are cognizable in admiralty. The *Minturn* decision has functioned as a guideline for courts in various circuits, which have applied its holding on a case by case basis. While there are a few contracts which seem close to the jurisdictional dividing line, what appears to be disarray, to some commentators, has a delicate and predictable order, created by the courts, *Sisson v. Rudy*, 58 U.S.L.W. 4941, 4945 (U.S. June 25, 1990).

To overrule or even limit the *Minturn* decision, would open the Federal Courts to a plethora of actions, involving shoreside contracts, which would be better left decided by the state courts. Uniformity of law is not advanced by extending admiralty jurisdiction to an agency contract, simply because it speaks of services rendered to ships. 1 S. Friedell, *Benedict on Admiralty*, § 182 (7th ed. 1989).

Finally, Exxon argues that *Minturn* fails to protect those who provide necessary services or supplies to vessels, in an attempt to create an issue of public importance and fit this case within the Court's general principle that Writs of Certiorari will only be granted in those cases where the principle involved is important to the public and not just to the parties. *Layne & Co. v. Western Well Workers*, 261 U.S. 387,

393 (1923). However, the decision below turns upon its own facts and will effect few other suppliers of necessaries, due to the unique contractual provisions contained in the Exxon/Waterman and Exxon/Arabian Marine agreements. In view of the facts, as found by the District Court, protection of Exxon will not come from overturning or limiting *Minturn*. Exxon can protect itself in the future by rewriting its procurement agreements. In addition, Exxon and other agents who procure necessaries and supplies can protect their interests by recognized means. *Tramp Oil & Marine Ltd. v. M/V MERMAID I*, 630 F. Supp. 630, 633 (D.P.R. 1986), aff'd. 805 F.2d 42 (7th Cir. 1986).

CONCLUSION

Certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

FRANCIS A. MONTBACH
Counsel of Record

KARIN A. SCHLÖSSER

BIGHAM ENGLAR JONES & HOUSTON
Counsel for Respondent
14 Wall Street
New York, New York 10005
(212) 732-4646

August 2, 1990

APPENDIX

Appendix

International Shipholding Corporation

St. Rose Fleeting Co., Inc.

N. W. Johnsen & Co., Inc.

LCI Shipholdings, Inc.

Adrian/Shipping, Ltd.

Netherlands Maritime Agencies, Ltd.

Netherlands Freight Agency

Material Transfer, Inc.

Florida Barge Lines

Bahulu Shipping

Bay Insurance

Probo Bangor Shipping Pte. Ltd.

Marco Shipping Pte., Ltd. (Singapore)

Marco Shipping Pte., Ltd. (Netherlands)

New Combo, Inc.

New Combo Ships Pte., Ltd.

Second Probo, Inc.

Gulf South Shipping Pte., Ltd.

Rodriquez Sons Co., Inc.

Forest Lines, Inc.

Cypress Auto Carriers, Inc.

Waterman Steamship Corporation

(3)

No. 90-34

Supreme Court, U.S.
FILED
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[illegible] JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

EXXON CORPORATION, PETITIONER

v.

CENTRAL GULF LINES, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

KENNETH W. STARR
Solicitor General
STUART M. GERSON
Assistant Attorney General
DAVID L. SHAPIRO
Deputy Solicitor General
HARRIET S. SHAPIRO
Assistant to the Solicitor General
ROBERT S. GREENSPAN
RICHARD A. OLDERMAN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether an agent who procures and pays for necessary maritime supplies for a vessel in maritime commerce is entitled to assert a maritime lien against the vessel.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-34

EXXON CORPORATION, PETITIONER

v.

CENTRAL GULF LINES, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. For 40 years, petitioner Exxon Corporation was Waterman Steamship Corporation's exclusive worldwide supplier of bunker fuel oil. Pursuant to contract, petitioner supplied the fuel to Waterman vessels either directly or, when Waterman vessels called at ports where petitioner did not maintain its own bunker stations, through local suppliers. When a local supplier was used, the fuel was delivered by the local supplier directly to the vessel; petitioner paid the supplier and then billed Waterman. Pet. App. A23-A24.

The vessel M/V Green Harbour ex William Hooper ("the Hooper") is a United States flag ship owned by respondent Central Gulf Lines, Inc. Waterman chartered the vessel for use in its common carrier service between United States ports and ports in the Middle East. On October 26, 1983, Arabian Marine Operating Co., Ltd., a local supplier of fuel at the port in Jeddah, Saudi Arabia, delivered 4,242.47 tons of bunker fuel to the Hooper, as contemplated by the agreement between petitioner and Waterman. Petitioner accordingly paid Arabian Marine for the fuel, and then billed Waterman for its $763,644 cost. Pet. App. A24-A25.

2. Waterman, however, was insolvent; on December 1, 1983, the company sought reorganization under Chapter 11 of the bankruptcy laws. During reorganization proceedings, respondents Central Gulf agreed that, should a court hold the Hooper liable in rem for the cost of the bunker fuel, respondent would assume personal liability for the cost of the fuel. Respondent provided petitioner with a letter of credit, as security for this promise. Pet. App. A25.

After a reorganization plan for Waterman was confirmed in June 1986, petitioner was permitted to pursue its claim for the cost of supplying bunker fuel to the Hooper. Accordingly, it commenced this lawsuit in federal district court against both Central Gulf and the Hooper. Pet. App. A25. Petitioner urged that its agreement with Waterman to procure bunker fuel in Saudi Arabia fell within the district court's admiralty jurisdiction, and therefore claimed to have a maritime lien upon the Hooper, pursuant to the Federal Maritime Lien Act, 46 U.S.C. 971 (1982 & Supp. V 1987).

3. The district court recognized (Pet. App. A27, A30-A31) that as a prerequisite to the existence of a maritime lien, the subject matter of the contract in dispute must

fall within the court's admiralty jurisdiction. The court noted that "[w]hile admiralty jurisdiction provides 'fairly complete coverage of the primary operational and service contracts of the shipping industry,' there still exist 'a few anomalous exceptions' * * * [including] the rule that agency contracts under which a party agrees to solicit or procure freight, passengers, crew, or supplies for a vessel are not maritime contracts." *Id.* at A28, quoting G. Gilmore & C. Black, *The Law of Admiralty* § 1-10 (2d ed. 1975). The district court observed (Pet. App. A28) that the Second Circuit, in *Peralta Shipping Corp.* v. *Smith & Johnson (Shipping) Corp.*, 739 F.2d 798 (1984), cert. denied, 470 U.S. 1031 (1985), had refused to discard this exception, finding itself bound by this Court's decision in *Minturn* v. *Maynard,* 58 U.S. (17 How.) 477 (1855). Applying "the principles enunciated in *Peralta*" to the facts of this case (Pet. App. A29), the district court concluded that the agreement whereby petitioner arranged for the provision of fuel to Waterman's vessels at Jeddah constituted an agency contract (*id.* at A29-A30), and that there was no legitimate basis for distinguishing the general agency, or husbanding, contract at issue in *Peralta*[1] from the bunkering agreement here (*id.* at A31).

The court denied petitioner's motion for reconsideration (Pet. App. A3-A21), observing that although the *Minturn* rule had "suffered some erosion in other circuits," the Second Circuit had refused to depart from *Minturn* absent

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[1] "[G]eneral agency contracts that call for 'husbanding' a vessel [involve] arranging for the performance of the various services that are preliminary to maritime movement." *Peralta Shipping Corp.* v. *Smith & Johnson (Shipping) Corp.*, 470 U.S. 1031 (1985) (Blackmun, J., dissenting from denial of certiorari). Thus, in *Peralta,* the agreement under consideration "provided services such as arranging for fuel, water, provisions, customs clearance, and stevedoring," mostly to be performed by others than the contracting parties. Pet. App. A28-A29.

action by this Court (*id.* at A11-A12). The district court rejected petitioner's argument that in procuring bunkering services for Waterman, it was acting as a special and not a general agent (*id.* at A13); it then went on to observe that the Second Circuit had refused to distinguish special agency agreements from general ones, and that in any event, special agents that provide preliminary services are outside the admiralty jurisdiction (*id.* at A13-A14).[2] It specifically held that the "services performed by [petitioner at Jeddah] were merely preliminary." (*id.* at A17).[3]

4. The court of appeals affirmed, "substantially for the reasons given in [the district court's] two thorough opinions" (Pet. App. A2).

DISCUSSION

In reaching the conclusion challenged by petitioner, the courts below relied to a significant extent on this Court's

[2] The district court rejected petitioner's invitation to "disentangle the preliminary contract rule from the general agency rule," observing that "the agency exception to maritime jurisdiction is less of an anomaly when viewed as a subset of the preliminary contract doctrine." Pet. App. A16-A17. See *id.* at A29 (quoting *The Thames,* 10 F. 848 (S.D. N. Y. 1881)):

> The distinction between preliminary services leading to a maritime contract and such contracts themselves ha[s] been affirmed in this country from the first, and not yet departed from. It furnishes a distinction capable of somewhat easy application. If it be broken down, I do not perceive any other dividing line for excluding from the admiralty many other sorts of claims which have a reference, more or less near or remote, to navigation and commerce. If the broker of a charter-party be admitted, the insurance broker must follow, – the drayman, the expressman, and all others who perform services having reference to a voyage either in contemplation or executed.

[3] The district court also rejected petitioner's claim that it was entitled to an admiralty lien by virtue of subrogation (Pet. App. A18-A21). Petitioner does not seek further review of that claim.

decision in *Minturn* v. *Maynard,* 58 U.S. (17 How.) 477 (1855). That decision, largely unexplained and perhaps questionable even when written, has been much criticized by courts and commentators, and its probable rationale may well be inconsistent with subsequent developments in admiralty jurisdiction. Moreover, the decision has spawned considerable confusion in the lower courts, which are in disagreement over its meaning and over the relevant distinctions to be drawn in determining the scope of admiralty jurisdiction. Although it is not certain that this case would have been decided differently in any other circuit, we submit that it is nevertheless an appropriate vehicle for considering the present validity and reach of the *Minturn* decision. We therefore recommend that the petition for a writ of certiorari be granted.

1. Justice Story observed early in the nineteenth century that the admiralty jurisdiction of the United States includes "all contracts (wheresoever they may be made or executed, or whatsoever may be the form of the stipulations) which relate to the navigation, business or commerce of the sea." *De Lovio* v. *Boit,* 7 F. Cas. 418, 444 (C.C.D. Mass. 1815) (No. 3,776). Whether a contract is governed by maritime law thus depends on the subject matter of the agreement. See *North Pacific S.S. Co.* v. *Hall Bros. Marine Ry. & Shipbuilding Co.,* 249 U.S. 119, 125 (1919) ("in matters of contract it depends upon the subject matter * * * the true criterion being the nature of the contract, as to whether it have reference to maritime service or maritime transactions"); *Kossick* v. *United Fruit Co.,* 365 U.S. 731, 736 (1961) ("The only question is whether the transaction related to ships and vessels, masters and mariners as agents of commerce."). Accord, *e.g., Hamburg-Amerika Line* v. *Gulf Puerto Rico Lines, Inc.,* 579 F.2d 115, 118 (1st Cir. 1978); *Owens-Illinois, Inc.* v. *United States Dist. Court,* 698 F.2d 967, 970 (9th Cir. 1983); *CTI-Container*

Leasing Corp, v. *Oceanic Operations Corp.*, 682 F.2d 377, 379 (2d Cir. 1982).[4]

Minturn v. *Maynard, supra,* has been read to establish an "agency" exception to this general rule. The libellant in *Minturn* was both a general agent and a broker; he sued in personam to recover from a vessel's owners money he had spent in procuring ship's services and supplies. This Court dismissed the suit in a brief opinion, finding "nothing in the nature of a maritime contract in the case." 58 U.S. (17 How.) at 477. The Court's entire explanation for this conclusion (*ibid.*) was this:

> The libel shows nothing but a demand for a balance of accounts between agent and principal, for which an action in *assumpsit,* in a common law court, is the proper remedy. That the money advanced and paid for respondents was, in whole or in part, to pay bills due by a steamboat for repairs or supplies, will not make the transaction maritime, or give the libellant a remedy in admiralty. Nor does the local law of California, which authorized an attachment of vessels for supplies or repairs, extend to the balance of accounts between agent and principal, who have never dealt on the credit, pledge, or security of the vessel.

[4] Nevertheless, as this Court has noted, "[t]he boundaries of admiralty jurisdiction over contracts—as opposed to torts or crimes—being conceptual rather than spatial, have always been difficult to draw." *Kossick* v. *United Fruit Co.*, 365 U.S. 731, 735 (1961). See S. Friedell, *Benedict on Admiralty* § 183, at 12-8 (7th ed. 1989) ("principles used to define maritime contracts * * * [are] easier to state than to apply"). It is therefore not surprising that decisions marking this boundary are difficult to reconcile. It has been held, for example, that a contract to repair a vessel is maritime, *New Bedford Dry Dock Co.* v. *Purdy,* 258 U.S. 96 (1922), yet a contract to build a vessel is not, *Thames Towboat Co.* v. *The Schooner "Francis McDonald",* 254 U.S. 242 (1920), *People's Ferry Co.* v. *Beers,* 61 U.S. (20 How.) 393 (1858); and while a lease of cargo containers for use on a ship is maritime, *CTI-Container Leasing* v. *Oceanic Operations, supra,* as is a contract to purchase equipment for a ship, *e.g., Radiomarine Corp.* v. *Gulf Northern Co.*, 394 F. Supp. 381 (E.D. Mo. 1975) (radio and radar systems), a contract to purchase a vessel is not. *Economou* v. *Bates,* 22[illegible] F.Supp. 988 (S.D.N.Y. 1963). Cf. *Sisson* v. *Ruby,* 110 S.Ct. 2892, 2901 & n.4 (1990) (Justice Scalia, joined by Justice White, concurring in result and noting "[t]he impossibility of drawing a principled line with respect to what, in addition to the fact that the contract relates to a vessel * * * is needed in order to make the contract itself 'maritime.' ").

Analysis of *Minturn* should proceed from an understanding of its historical context. In colonial times, only contracts entered into on the high seas and to be performed on the high seas were deemed within admiralty's jurisdiction in England. See Coke, *The Fourth Part of the Institutes of the Laws of England Concerning the Jurisdiction of the Courts* 137 (6th ed.) (London 1681); Robertson, *Admiralty and Federalism* 56-58 (1970); *De Lovio* v. *Boit,* at 421.

England's narrow interpretation of admiralty jurisdiction was rejected in America's colonial courts and subsequently in the courts of the United States. See generally, *De Lovio* v. *Boit, supra.* However, the principle that admiralty jurisdiction was limited to the high seas, and only so far inland as the ebb and flow of the tides, remained a viable doctrine in this country during the first half of the nineteenth century.[5] For example, Justice Story, writing

[5] Observance of this principle may have been in part due to a concern for State's rights. In 1826, Chancellor Kent observed that

> If the admiralty and maritime jurisdiction of the district courts embrace all maritime contracts, then suits upon policies of insurance, charter-parties, maritime hypothecations, contracts for building, repairing, supplying, and navigating ships, and contracts between part owners of ships, must be tried in the admiralty by a single judge, to the exclusion of the trial by jury; and the state courts would be divested, at one stroke, of a vast field of commercial jurisdiction. [1 Kent, *Commentaries,* 372 (12th ed. 1873)].

for this Court, adhered to the so-called "tidewater limitation," *i.e.*, that admiralty jurisdiction extended only so far as the sea and the tidewaters, "as far as the tide flows." See *The Steamboat Thomas Jefferson*, 23 U.S. (10 Wheat.) 428, 429 (1825); *United States* v. *Coombs*, 37 U.S. (12 Pet. 72, 76 (1838). Writing in 1848, Justice Nelson encapsulated American admiralty law's suzerainty over matters of contract as follows (*New Jersey Steam Navigation Co.* v. *Merchant's Bank*, 47 U.S. (6 How.) 344, 392 (1848) (emphasis added)):

> On looking into the several cases in admiralty which have come before this court, and in which its jurisdiction was involved, or came under its observation, it will be found that the inquiry has been, not into the jurisdiction of the court of admiralty in England, but into the nature and subject matter of the contract, whether it was a maritime contract, and the service a maritime service, *to be performed upon the sea, or upon waters within the ebb and flow of the tide.*

Thus, as Professor Moore has noted, "some remnant of the restrictive English mentality regarding the admiralty appears to have been present in the minds of the court that decided the early cases." 7A J. Moore & A. Palaez, *Moore's Federal Practice* ¶ .250, at 3004-3005 n.10 (2d ed. 1985). The *Minturn* Court's decision may be an example of this tendency, reflecting the fact that the contract there at issue was not one to be performed on the high seas, or within the ebb and flow of the tide.

Alternatively, one commentator has remarked that at the time *Minturn* was decided, it was deemed necessary to have a lien interest in a vessel before a contract would be considered maritime. See Note, *General Agency Agreements and Admiralty Jurisdiction*, 17 Conn. L. Rev. 595, 603 (1985). The *Minturn* Court specifically noted that the "agent and principal [there involved] ha[d] never dealt on

the credit, pledge, or security of the vessel," 58 U.S. (17 How.) at 477, *i.e.*, the libellant never had a lien interest in the vessel. That fact may thus have provided a basis for the Court's rejection of admiralty jurisdiction.

Both of these possible rationales for *Minturn* were rejected by this Court shortly after *Minturn* was decided. In 1851, three years after *Minturn*, this Court held in *The Propeller Genesee Chief* v. *Fitzhugh*, 53 U.S. (12 How.) 443, that admiralty jurisidiction extended to all navigable waters, and was not limited to waters within the ebb and flow of the tide. In *Insurance Co.* v. *Dunham*, 78 U.S. (11 Wall.) 1, 26 (1871), the Court held that "as to contracts * * * the true criterion is the nature and subject-matter of the contract, as whether it was a maritime contract, having reference to maritime service or maritime transactions," and established that a contract may be maritime, and give rise to a right to sue on the contract in personam, even when the contract does not create a lien. *Minturn* therefore rests on concepts long abandoned in American admiralty law.[6]

Despite these developments in the law of admiralty, *Minturn* has stood for almost 140 years without reconsideration by the Court. Not surprisingly, however, it has been repeatedly criticized by commentators. Professor Moore has observed that the *Minturn* rule is an unfortunate anomaly: "Quite clearly, such [general agency] agreements are an integral part of, and in furtherance of, maritime commerce and, consequently, should be cognizable within

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[6] Those concepts appear to have been abandoned in English admiralty law as well. An English admiralty court today would find a contract for the supply of fuel to a ship well within its jurisdiction. See Supreme Court Act 1981, § 20(2)(m), 51 Halsbury's *Statutes of England* 612-613 (3d ed. 1981) (extending admiralty jurisdiction to claims for goods and materials supplied to a ship for its operation and maintenance); *The D'Vora*, 2 All E.R. 1127 (P.1952) (holding that fuel is clearly material supplied to a ship for its operation).

the admiralty jurisdiction of the district courts." 7A J. Moore & Palaez, *Moore's Federal Practice* ¶ .250, at 3006 (2d ed. 1985). And Professors Gilmore and Black have characterized the general agency exception as "of dubious defensibility," and predicted "that the Supreme Court, when the issue reaches it, will hold 'general agency' and other vessel agreements within the jurisdiction—along with actions for accountings on them." G. Gilmore & C. Black, *The Law of Admiralty* 28, n. 94b (2d ed. 1975).[7]

2. In light of these criticisms, this Court's reconsideration of the *Minturn* decision might well be warranted, even in the absence of any disagreement over its meaning in the lower courts. But such disagreement does exist. As Justice Blackmun, joined by Justice Marshall, noted in dissenting from the denial of certiorari in *Peralta, Minturn* is an exception to admiralty jurisdiction "that has been applied inconsistently and that has created unnecessary confusion in the federal courts." 470 U.S. at 1031-1032. Since "uniformity and predictability in the maritime industry were the ends sought in the Constitution when federal-court maritime jurisdiction was created in the first instance," this inconsistency is particularly inappropriate in the admiralty

[7] See also S. Friedell, *Benedict on Admiralty* § 183, at 12-9 (7th ed. 1989) (noting that "general agency agreements * * * are 'intimately related to the shipping industry and would warrant inclusion within admiralty,'" quoting *Peralta*). C. Black, *Admiralty Jurisdiction: Critique and Suggestions,* 50 Colum. L. Rev. 259, 274 (1950) (suggesting that admiralty jurisdiction should extend to all cases "involving the enforcement, policing or adjustment of business arrangements as a practical matter primarily concerned with sea, lake and river transport"); Hough, *Admiralty Jurisdiction Of Late Years,* 37 Harv. L. Rev. 529 (1924); Note, *General Agency Agreements and Admiralty Jurisdiction,* 17 Conn. L. Rev. 595, 627 (1985) (suggesting that general agency agreements should be within admiralty jurisdiction unless agent merely procures, but does not perform or pay for services or supplies).

context (*id.* at 1034).[8] Accordingly, the instant decision—and others rendered since the decision in *Peralta*—serve to buttress the need for review by this Court.

As evidenced by this decision, the Second Circuit remains committed to the view that under *Minturn,* agency agreements are excluded from admiralty jurisdiction. See Pet. App. A11-A16, A31; accord *Peralta Shipping Corp.* v. *Smith & Johnson (Shipping) Corp.,* 739 F.2d 798, 802-804 (2d Cir. 1984), cert. denied, 470 U.S. 1031 (1985); *Admiralty Oriental Line* v. *Atlantic Gulf & Oriental S.S. Co.,* 88 F.2d 26, 27 (2d Cir. 1937). Cf. *Ingersoll Milling Mach. Co.* v. *M/V Bodena,* 829 F.2d 293, 301-302 (2d Cir.1987); *Cory Bros. & Co.* v. *United States,* 51 F.2d 1010, 1012 (2d Cir. 1931).[9] Although it has stated that it would "welcome" the overruling of *Minturn* (*Peralta,* 739 F.2d at 804), the Second Circuit has rejected a variety of distinctions that limit the impact of that decision in other circuits, noting—with some accuracy—that "such hair-splitting distinctions would blur, if not obliterate, a rather clear admiralty demarcation" (*ibid.*).[10] Moreover, in this

[8] See also *Sisson* v. *Ruby,* 110 S. Ct. 2892, 2898 (1990) ("The need for uniform rules of maritime conduct and liability is not limited to navigation, but extends at least to any other activities traditionally undertaken by vessels, commercial or non-commercial".); *Knickerbocker Ice Co.* v. *Stewart,* 253 U.S. 149, 160 (1920); 3 *Elliot's Debates on the Federal Constitution* 532, 571 (2d ed. 1836).

[9] The Eleventh circuit agrees with the Second. *E.S. Binnings, Inc.* v. *M/V Saudi Riyadh,* 815 F.2d 660, 662-665 (11th Cir. 1987).

[10] In *Peralta* (739 F.2d at 803-804), the Second Circuit refused to "subdivid[e] the category of general agency contracts based on the degree of importance of the services rendered by the agent or on the extent of supervision of performance," as the Ninth Circuit "arguably" did in *Hinkins Steamship Agency* v. *Freighters Inc.,* 498 F.2d 411 (1974). The Second Circuit also criticized the *Hinkins* distinction between general and special agency agreements (739 F.2d at 803 n. 4). Accord *Continental Cameras Co.* v. *FOA & Son Corp.,*

case the district court found no reason to distinguish the agreement at issue here—to procure bunkering services—from a general agency contract (Pet. App. A31, A16-A17), and the court of appeals agreed (*id.* at A2).

At the other end of the spectrum, the Fifth Circuit has refused to recognize any rule excluding agency agreements from admiralty jurisdiction. In *Hadjipateras* v. *Pacifica, S.A.*, 290 F.2d 697, 703 (1961), the Fifth Circuit held that an action for breach of an agency contract for the management and operation of a vessel is within the admiralty jurisdiction, since "the contract is everything classically known as a maritime contract. It concerns a ship. It relates not only to a ship; its very purpose is to effectuate the physical, economic operation and employment of a vessel." In so holding, the court observed that *Minturn* merely forecloses admiralty jurisdiction over an action for "an accounting as such" (290 F.2d at 704 & n.15).[11]

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658 F. Supp. 287, 289 (S.D.N.Y.), aff'd, 831 F.2d 45 (2d Cir. 1987); Pet. App. A13-A16.

[11] The Eleventh Circuit has suggested that *Hadjipateras* must be read in light of the particular provisions of the contract before the court in that case, noting that "[t]he agreement involved in *Hadjipateras* was a vessel management agreement, not a general agency agreement. The core of that agreement was the actual physical operation of the vessel by the agent." *E.S. Binnings, Inc.* v. *M/V Saudi Riyadh*, 815 F.2d 660, 664 (1987). See also *CTI-Container Leasing Corp.* v. *Oceanic Operations Corp.*, 682 F.2d 377, 380 n. 4 (2d Cir. 1982) (*Hadjipateras* establishes that "a contract for managing a ship is within [admiralty jurisdiction]"). The Fifth Circuit's citations to *Hadjipateras* in the admiralty context have simply referred to it as authority for the proposition that admiralty courts may award equitable relief. See, *e.g.*, *Inland Credit Corp.* v. *M/T Bow Egret*, 552 F.2d 1148, 1153 n.6 (1977); *Cates* v. *United States*, 451 F.2d 411, 414 n.8 (1971); *Florida Bahamas Lines Ltd.* v. *Steel Barge "Star 800"*, 433 F.2d 1243, 1247 (1970). Nevertheless, it is by no means clear that the Fifth Circuit would limit its holding in *Hadjipateras* in the manner suggested by the Eleventh Circuit.

Similarly, the Ninth Circuit, in *Hinkins Steamship Agency* v. *Freighters, Inc.*, 498 F.2d 411 (1974), questioned *Minturn*'s continued validity (*id.* at 412), and found the agency agreement at issue there to be a maritime contract. The Ninth Circuit emphasized that although the husbanding agent had "*procured* [maritime services] and did not perform them directly, * * * [the facts that] their performance was its direct responsibility, that the services were clearly maritime and necessary for the continuing voyage, and that [the agent] was directly engaged in supervision, makes [the service] maritime and the contract sued upon a maritime contract"—particularly since the agreement was limited to a specific voyage[12] and "there was repeated attendance on board the vessel" by the agent. *Ibid.*[13]

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[12] The Eleventh Circuit in *Binnings* relied on this distinction, noting that in *Hinkins*, the contract was for "service as husbanding agent * * * for one ship in connection with a specific voyage, * * * [where] the husbanding services were supervised directly by the husbanding agent." 815 F.2d at 665. A subsequent citation to *Hinkins* in the Ninth Circuit characterizes it as holding that a "contract relating to a ship in its use as such, or to commerce or navigation on navigable waters, is subject to maritime law and falls under admiralty jurisdiction." *Foss Launch & Tug Co.* v. *Char Ching Shipping*, 808 F.2d 697, 699 (1987).

[13] In an earlier case, *The Golden Gate* v. *Associated Oil Co.*, 52 F.2d 397 (1931), the Ninth Circuit, without citing *Minturn*, the preliminary contract rule, or the related cases, affirmed a decree in rem against the Golden Gate for the value of oil furnished to it by libellant, finding it "immaterial" that delivery of the oil was made by a third party, "[i]nasmuch as the contract of sale was between the libellant and the charterer, and the supplies were furnished by the libellant pursuant thereto." 52 F.2d at 400. See also *Gulf Trading & Transp. Co.* v. *M/V Tento*, 694 F.2d 1191 (9th Cir. 1982) (apparently assuming that under U.S. law, fuel broker may assert admiralty lien for fuel it procured and paid for). Similarly, although the First Circuit has not discussed the issue, it noted in *Tramp Oil & Marine, Ltd.* v. *M/V Mermaid I*, 805 F.2d 42, 44 (1st Cir. 1986)—in a situation in which Exxon

The circuits are thus in disagreement about whether admiralty jurisdiction extends to certain types of contracts—for example, although the Second Circuit in *Admiral Oriental Line,* found a "managing operator" agency contract was not within admiralty jurisdiction, the Ninth Circuit in *Hinkins* reached a contrary result, precisely because the contract before it provided for direct management services. See *Peralta,* 739 F.2d at 804. And there is little doubt, in light of *Admiral Oriental Line* and *Peralta,* that the Second Circuit would have reached a different result from that reached by the Fifth Circuit in *Hadjipateras.* Moreover, *Hadjipateras* itself at least suggests that the Fifth Circuit would find the typical husbanding agreement—like the one at issue in *Peralta,* for example—to be subject to admiralty jurisdiction, although it has not apparently had occasion to do so to date. See note 11, *supra.*

It is not certain that the present case would have been decided differently had it arisen in any other circuit.[14] The agreement under which petitioner procured and paid for the bunkering services provided to the Hooper did not provide for any direct management of Waterman's ships

"caused Colonial Oil Industries, Inc. (Colonial) to supply • • • oil to the Mermaid,"—that "[n]o one disputes that Exxon and Colonial, as direct suppliers of the fuel to the Mermaid, would be entitled to a maritime lien." That issue was not in dispute, since both Exxon and Colonial had been paid in full.

[14] In the district court, petitioner strenuously contested the characterization of its agreement to procure bunkering services for Waterman as an agency contract, but it does not renew that objection in this Court. We accordingly accept, for purposes of our analysis, the district court's conclusion that the relevant contractual provisions established that petitioner was acting as Waterman's agent in procuring bunkering services where it did not have the appropriate facilities to provide those services directly.

by petitioner, as did the *Hadjipateras* agreement.[15] And many of the factors found significant by the Ninth Circuit in *Hinkins* in establishing admiralty jurisdiction are absent in this case.[16] (But the results of the Ninth Circuit decisions cited at note 13, *supra,* do appear to be more directly in conflict with the decision below.)

Even if this Court were to decide in this case that agency agreements are not *per se* excluded from admiralty jurisdiction, difficult questions would remain. For example, many agency agreements would undoubtedly properly be excluded from admiralty jurisdiction on the ground that they provide for services that are merely preliminary to maritime transactions. See, *e.g.,* S. Friedell, *Benedict On Admiralty* § 183 (7th ed. 1989).[17]

[15] Even assuming that the Fifth Circuit would, if faced with an appropriate case, adhere to its broad language in *Hadjipateras,* it might conclude that this case involves a suit for "an accounting as such," still foreclosed by *Minturn.* 290 F.2d at 704. Like the appellant in *Minturn,* petitioner simply seeks recovery of sums allegedly "advanced and paid for respondents • • • to pay bills due by a [vessel] for • • • supplies." 58 U.S. at 477.

[16] Petitioner engaged in no direct supervision of Waterman's vessels, had no direct relationship to any specific vessel or voyage, and, although it procured and paid for the bunkering services, title to the oil provided passed directly from Arabian Marine, the supplier, to Waterman. On the other hand, although the district court in the present case was "persuaded that [petitioner] was Waterman's general agent with respect to fuel supplies," (Pet. App. A13), a circuit anxious to assert admiralty jurisdiction and finding the distinction useful might well have focused on the fact that the dispute concerned only the provision of fuel to the Hooper at Jeddah, and might therefore have concluded that a special agency agreement was at issue.

[17] The Second Circuit has consistently viewed the general agency rule it derives from *Minturn* as a particular application of the preliminary contract rule. See Pet. App. A16-A17. It has, moreover, noted that "[t]he distinction between 'preliminary' and maritime contracts has also become somewhat blurred." *Peralta,* 739 F.2d at 803 n.4. The district court, observing that "[i]t would be inappropriate for me to

Nevertheless, we believe this case is an appropriate vehicle for reconsideration of the Court's holding in *Minturn* and for resolution, at least in part, of the conflict in approach among the circuits. First, and most important, the courts below plainly thought themselves constrained by *Minturn*—in ways in which other circuits would not—from determining whether and to what extent agency agreements fall within admiralty jurisdiction.[18] Second, if this Court determines that agency agreements are not necessarily precluded from the scope of admiralty, the Second Circuit in this case, as well as other circuits in comparable cases, will be free to focus on whether a particular agency agreement falls outside admiralty jurisdiction because it is truly "preliminary" and not simply because it involves an agent-principal relationship. See notes 2, 17, *supra*.

The Court may eventually conclude that on balance, the interests of certainty and predictability are best served by reaffirming the longstanding *Minturn* rule. Cf. *Sisson* v. *Ruby*, 110 S. Ct. at 2901 & n.4 (Scalia, J., concurring). But even if the Court ultimately so concludes, the controversy over the desirability of that rule, and the disagree-

---

disentangle the preliminary contract rule from the general agency rule," concluded that "the services performed by [petitioner] were merely preliminary." Pet. App. A16-A17. If this Court should overturn *Minturn*, thus "disentangling" the general agency issue, it would be appropriate for the courts below to reconsider the preliminary contract issue. The question would be whether the present contract, under which petitioner not only procured but also paid for the delivery of fuel to Waterman's vessel, is any more "preliminary" than an arrangement under which petitioner itself sold the oil to Waterman—an arrangement that the district court recognized as falling within admiralty jurisdiction. Pet. App. A33.

[18] The continuing existence of this constraint could well encourage forum shopping by those wishing to assert a maritime lien, in the belief that the chances of succeeding in that effort are greater in the Fifth or Ninth Circuits.

ment over its precise scope, warrant review by this Court. See 470 U.S. 1031 (1985) (Blackmun, J., dissenting from the denial of certiorari in *Peralta*).

In sum, we believe that the continuing validity and, if valid, the scope of the *Minturn* decision is ripe for review by this Court, and that this case presents an appropriate vehicle for that review.

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

KENNETH W. STARR
Solicitor General
STUART M. GERSON
Assistant Attorney General
DAVID L. SHAPIRO
Deputy Solicitor General
HARRIET S. SHAPIRO
Assistant to the Solicitor General
ROBERT S. GREENSPAN
RICHARD A. OLDERMAN
Attorneys

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(5)

No. 90-34

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

EXXON CORPORATION,

Petitioner,

—v.—

CENTRAL GULF LINES, INC., *in personam*, and the M/V GREEN HARBOUR (ex WILLIAM HOOPER), *in rem*, her engines, boilers, tackle, etc. and a certain Letter of Credit No. P 621208 dated December 26, 1984 issued by the Chase Manhattan Bank, N.A., *in rem*,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOINT APPENDIX

ARMAND MAURICE PARÉ, JR.
Counsel of Record

BRADLEY F. GANDRUP, JR.

NOURSE & BOWLES
Counsel for Petitioner
One Exchange Plaza
At 55 Broadway
New York, New York 10006
(212) 952-6200

FRANCIS A. MONTBACH
Counsel of Record

KARIN A. SCHLÖSSER

BIGHAM, ENGLAR,
JONES & HOUSTON
Counsel for Respondents
14 Wall Street
New York, New York 10005
(212) 732-4646

PETITION FOR CERTIORARI FILED JULY 3, 1990
CERTIORARI GRANTED JANUARY 14, 1991

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UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

	Date	Filing or Proceeding
1.	12/9/86	Exxon Corporation's ("Exxon") Summons and Complaint filed.
2.	1/6/87	Stipulation and Order extending the time to answer of Central Gulf Lines, Inc. *et al.* (collectively "Central Gulf") to 1/29/87 filed.
3.	1/9/87	Central Gulf's Answer filed.
4.	7/20/87	Order Substituting the firm of Nourse & Bowles for the firm of Kirlin, Campbell & Keating as counsel for Exxon filed.
5.	5/31/88	Exxon's Notice of Motion for Summary Judgment filed.
6.	5/31/88	Affidavits of Armand M. Paré, Jr., Esq., Adam V. Rudzki and James E. Sharkey in Support of Exxon's Motion for Summary Judgment filed.
7.	5/31/88	Exxon's Statement of Material Facts Pursuant to S.D.N.Y. Local Rule 3(g) filed.
8.	5/31/88	Exxon's Memorandum of Law in Support of its Motion for Summary Judgment filed.
9.	6/23/88	Affidavits of Francis A. Montbach, Esq. and Raymond J. Salassi, Jr. in Opposition to Exxon's Motion for Summary Judgment filed.
10.	6/23/88	Central Gulf's Memorandum of Law in Opposition to Exxon's Motion for Summary Judgment filed.

	Date	Filing or Proceeding
11.	6/23/88	Central Gulf's Notice of Cross-Motion for Summary Judgment filed.
12.	6/23/88	Central Gulf's Statement of Material Facts Pursuant to S.D.N.Y. Local Rule 3(g) filed.
13.	6/23/88	Affidavit of Francis A. Montbach, Esq. in Support of Central Gulf's Cross-Motion for Summary Judgment filed.
14.	6/23/88	Central Gulf's Memorandum of Law in Support of Central Gulf's Cross-Motion for Summary Judgment filed.
15.	7/21/88	Exxon's Answer to Central Gulf's Statement of Material Facts Pursuant to S.D.N.Y. Local Rule 3(g) Statement filed.
16.	7/21/88	Reply Affidavit of Armand M. Paré, Jr., Esq. in Further Support of Exxon's Motion for Summary Judgment filed.
17.	7/21/88	Exxon's Reply Memorandum of Law filed.
18.	8/2/88	Central Gulf's Reply Memorandum of Law filed.
19.	8/2/88	Central Gulf's Supplementary Answering Local Rule 3(g) Statement filed.
20.	8/2/88	Reply Affidavit of Francis A. Montbach, Esq. in Further Support of Central Gulf's Cross-Motion for Summary Judgment filed.
21.	10/14/88	Supplemental Affidavit of Adam V. Rudzki in Support of Exxon's Motion for Summary Judgment filed.

	Date	Filing or Proceeding
22.	3/3/89	Opinion and Order denying Exxon's claim for a maritime lien of $763,644.60 with respect to the Jeddah delivery for lack of admiralty jurisdiction and granting Exxon's claim for a maritime lien of $13,241.63 with respect to the New York delivery filed.
23.	3/13/89	Exxon's Notice of Motion for Reargument of the Court's Opinion and Order dated 3/3/89 filed.
24.	3/13/89	Exxon's Memorandum of Law in Support of Motion for Reargue filed.
25.	4/7/89	Central Gulf's Memorandum of Law in Opposition to Exxon's Motion to Reargue filed.
26.	4/14/89	Exxon's Reply Memorandum of Law in Support of Exxon's Motion for Reargument filed.
27.	7/21/89	Opinion and Order denying Exxon's Motion for Reconsideration of Opinion and Order dated 3/3/89 filed.
28.	9/15/89	Judgment Ordering that Exxon's claim for a maritime lien of $763,644.60 with respect to the Jeddah delivery is dismissed; that Exxon's claim for a maritime lien with respect to the New York delivery is granted in the total amount of $20,320.30; that Exxon shall recover taxable costs and that Exxon shall recover post judgment interest filed.
29.	9/15/89	Judgment entered on docket.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

	Date	Filing or Proceeding
30.	10/4/89	Exxon's Notice of Appeal filed.
31.	10/6/89	Central Gulf's Notice of Cross-Appeal filed.
32.	12/8/89	Record on appeal filed.
33.	12/18/89	Appellant-Cross-Appellee Exxon's brief filed.
34.	12/18/89	Joint Appendix filed.
35.	1/16/90	Appellee-Cross-Appellant Central Gulf's brief filed.
36.	1/29/90	Appellant-Cross-Appellee Exxon's reply brief filed.
37.	4/2/90	Oral argument before Circuit Judges Feinberg, Pratt & Walker.
38.	4/5/90	Judgment affirmed by Summary Order.
39.	5/3/90	Mandate (Order) issued.
40.	7/10/90	Receipt of notice of Exxon's filing of Petition for a Writ of Certiorari dated 7/3/90 in Supreme Court of the United States.
41.	1/16/91	Receipt of certified copy of the Order of the Supreme Court of the United States dated 1/14/91 granting Exxon's Petition for a Writ of Certiorari.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EXXON CORPORATION,	
Plaintiff,	86 Civ. 9445 (WCC)
-against-	AFFIDAVIT OF ARMAND M. PARÉ, JR. IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT
CENTRAL GULF LINES, INC. *in personam* and the M/V GREEN HARBOUR (ex WILLIAM HOOPER) *in rem*, her engines, boilers, tackle, etc. and a certain letter of Credit No. P 621208 dated December 26, 1984 issued by the Chase Manhattan Bank, N.A., *in rem.*,	
Defendants.	

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

ARMAND M. PARÉ, JR., being duly sworn, deposes and states:

1. I am a member of the bar of this Court and counsel to the firm of Nourse & Bowles, attorneys for plaintiff, Exxon Corporation ("Exxon"). I make this affidavit in support of Exxon's motion for summary judgment. The key issues in this case are whether United States law governs the dispute in this case and hence whether Exxon is entitled to a lien for gas oil and bunker fuel oil supplied to a vessel now known as the GREEN HARBOUR (ex WILLIAM HOOPER; hereinafter referred to as the "Vessel" or "HOOPER") which is owned by

defendant, Central Gulf Lines, Inc. ("Central Gulf"). At the time of the supplies, the Vessel was on charter to Waterman Steamship Corporation ("Waterman"). Central Gulf has agreed to be liable *in personam* if *in rem* liability exists against the Vessel for the supplies in question. It is respectfully submitted that the relevant facts are uncontestable thereby rendering this case particularly appropriate for summary judgment.

2. Attached as Exhibit "1" is a letter dated July 25, 1984 from White & Case, former attorneys for Waterman at the time these claims were pending before the Bankruptcy Court in Waterman's Chapter XI Petition. This letter was copied to Central Gulf's former New York lawyers, Hill, Rivkins and also to Central Gulf's New Orleans lawyers, Jones, Walker. Enclosed with that letter from Waterman's attorneys and attached as exhibits hereto are the following:

Ex.-1-a. Engine Room Logs for the Vessel for October 26, 1983 showing the bunker fuel delivery at Jeddah.

Ex.-1-b. Fuel and water report for the Vessel on October 26, 1983 showing the bunker fuel delivery at Jeddah.

Ex.-1-c. Bunker Oil delivery receipt from barge M/T ZEINA re Jeddah delivery.

Ex.-1-d. Bunker Oil delivery receipt from barge M/T AABIBA re Jeddah delivery.

Ex.-1-e. Exxon invoice received by Waterman for Jeddah delivery.

Ex.-1-f. Voyage data report for voyage showing bunker fuel delivery at Jeddah.

Ex.-1-g. Telex on October 27, 1983 from Arabian Marine advising of delivery.

Ex.-1-h. Telex from Waterman/Athens to Waterman/NY advising of bunker fuel delivery at Jeddah.

In view of Waterman's admissions of the above Waterman records, Central Gulf cannot legitimately contest in a responding 3(g) Statement the authenticity of these documents or the facts which they evidence, including but not limited to the fact that bunker fuel was delivered to the Vessel at Jeddah on October 26, 1983.

3. Attached as Exhibit "2" is a further letter dated August 15, 1984 from White & Case, attorneys for Waterman, enclosing a "true and correct copy" of the 1983 Exxon/Waterman Fuel Oil Contract which is attached as Exhibit "2-a" (other exhibits are not attached as they would be duplicative of those in Exhibit "1"). In this letter, Waterman also indicated its agreement to stipulate to the following:

a. Waterman requested that Exxon supply the bunker fuel in question at Jeddah in accordance with the preexisting Exxon/Waterman contract dated April 8, 1983.

b. The Vessel was physically supplied with 4,242.2/7 metric tons (4,175.47 long tons) of bunker fuel oil on October 26, 1983 and true and accurate copies of receipts were admitted (these are attached hereto as "Ex.-1-c" and "Ex.-1-d").

c. Exxon invoiced Waterman for this delivery and Waterman had not paid for the supply.

4. Attached as Exhibit "3" is the Certificate of Ownership of the Vessel showing that the United States of America holds a First Preferred Mortgage on the Vessel and that her port of registry is New Orleans. Attached as Exhibit "4" is Central Gulf's Promissory Note to the United States of America together with the loan amortization schedule showing a balance owed to the United States in excess of ten million dollars at the

time of the supplies. Attached as Exhibit "5" is the Security Agreement and other documents between Central Gulf and the United States of America regarding the Vessel.

5. Attached as Exhibit "6" are certain addenda evidencing the Construction Differential Subsidy Agreement between the United States of America and Central Gulf pursuant to which the latter obtained a subsidy from the United States Government to build the Vessel in the United States, where building costs are generally higher than building abroad. Attached as Exhibit "7" is an addenda relating to the contract for the construction of the Vessel (hull No. 2257) (see Section I(b)). Attached as Exhibit "8" is the current entry from Lloyd's Register of Ships showing the Vessel's hull number (2257).

6. Attached as Exhibit "9" is the bareboat charter party for the Vessel between Central Gulf, as Owner and Waterman, as Charterer. This charter had to be approved by the Assistant Secretary of Commerce for Maritime Affairs of the United States in accordance with Article II, Section 2.04(c) of Exhibit 1 of the Security Agreement (Exhibit "5"). The charter party provides for arbitration of disputes between Central Gulf and Waterman in New York and application of U.S. Law.

7. Attached as Exhibit "10" are excerpts from the Journal of Commerce for September and October, 1983 showing that the HOOPER was engaged in Waterman's U.S. flag liner trade to and from ports in the United States and the "Red Sea-Persian Gulf."

8. Attached as Exhibit "11" is a copy of the cover page, table of contents, and Rule II(A) of Waterman's common carrier freight tariff covering the trade in question which tariff was on file with the Federal Maritime Commission, as required by United States law.

9. Attached as Exhibit "12" is the "8900" Lines Agreement to which Waterman was a party. This is a conference agreement among several carriers which serves to enable the various signatories to cooperate with each other with respect to

certain trade route, including Waterman's service to Saudi Arabia involved in this case. The "8900" Agreement is filed with the Federal Maritime Commission which thereby provides the signatories with an exemption from the anti-trust laws. The Agreement provides in Appendix "B", clause M, that disputes shall be arbitrated in New York and subject to "U.S. Federal law and the law of the State of New York.

10. Attached as Exhibit "13" are addenda to the Operational Differential Subsidy Agreement between the United States of America and Waterman pursuant to which the Vessel was included among those ships for which Waterman received an operational subsidy from the United States in connection with the trade route in question. In order to qualify for this, Waterman was required to use U.S. flag ships and American crews, as indicated.

11. Attached as Exhibit "14" are the first 10 pages of the Waterman Form 10-K filed with the Securities and Exchange Commission prior to Waterman's filing for reorganization, which Form 10-K makes reference to the U.S. flag carrier trade route in question and the Operational Differential Subsidy.

12. Attached as Exhibit "15" are pages 14-20 of the transcript of the testimony of Mr. Edward Matters. This portion of the testimony explains how Exxon came to agree in October, 1983 to directly make two supplies to Waterman vessels at Jeddah in place of Arabian Maritime Operating Co. Ltd. (the STONEWALL JACKSON and the WILLIAM HOOPER; this case only involves the WILLIAM HOOPER but reference to the STONEWALL JACKSON helps explain the background).

13. Attached as Exhibit "16" are pages 48-56 and 62-65 of the transcript of Mr. James E. Sharkey explaining how Exxon agreed with Waterman to make the two deliveries in question to Waterman vessels at Jeddah in October, 1983.

14. Attached as Exhibit "17" are pages 73-76 of the transcript of Mr. Adam Rudzki, the Credit Manager of Exxon

Company, International, explaining the decision by Exxon to supply the STONEWALL JACKSON and WILLIAM HOOPER in Jeddah in October, 1983.

15. On December 1, 1983, Waterman filed a Chapter XI bankruptcy proceeding which had the effect, *inter alia*, of preventing Exxon from enforcing its *in rem* lien rights against the HOOPER by writ of maritime arrest and of preventing Exxon from recovering the amounts due from Waterman in connection with the aforesaid two deliveries.

16. On or about March 30, 1984, Exxon moved to lift the automatic stay imposed by the bankruptcy court to permit Exxon to arrest the Vessel on account of the aforesaid deliveries or, alternatively, for adequate protection of its *in rem* lien claim against the Vessel.

17. Prior to determination of that motion, an agreement was entered into among Exxon, Central Gulf and Waterman pursuant to which Central Gulf agreed to assume personal liability to the extent that *in rem* lien liability existed against the Vessel (the "Agreement"). A copy of the Agreement is attached as Exhibit "18." A copy of the original and amended letter of credit issued to Exxon is attached as Exhibit "19" ("Letter of Credit").

18. Exxon is a New Jersey corporation with a principal place of business in New York; Central Gulf is a Delaware corporation with an office and place of business in New York; and Waterman is a New York corporation with a principal place of business in New York.

19. Attached as Exhibit "20" is an affidavit from Arabian Marine's Mr. Camille Hakim and statements from the various barge officers stating that they had no information that a lien for bunkers was prohibited by the relevant charter.

/s/ Armand M. Paré, Jr.

Sworn to before me this
23rd day of May, 1988.

/s/Sharon A. Graves
Notary Public

BUNKER OIL DELIVERY RECEIPT
ARABIAN MARINE OPERATING CO., LTD.

M/T, ZEINA

Date: 26th Oct, 1983

Account of: Messrs. Waterman Steamship Corporation

M/S S/S William Hooper

Port: Jeddah, S.A.

Description: B.F.O.

Quality:

Specific Gravity @ 15°C	Flash Point
0.9646	240

Viscosity			Water
Red Wood 1 100 F		1010	Trace
Kinematic Vis	cSt @ 50°C	125	
	cSt @ 40°C	210	

Quantity	Kiloliter	Metric Ton	Long Ton
	1,053.21	1,042.47	1,026.00

The foregoing quality and quantity are correct in every respect.

Chief Engineer /s/ Russell J. [illegible] C/B

Captain_____

Arabian Marine Operating Co., Ltd._____

Sample(s) on board

[Stamped by S.S. WILLIAM HOOPER and by Arabian Marine Operating Co. Ltd.
/s/ Y. Uchida]

BUNKER OIL DELIVERY RECEIPT
ARABIAN MARINE OPERATING CO., LTD.

M/T, HABIBA

Date: 26th Oct, 1983

Account of: Messrs. Waterman Steamship Corporation

M/S S/S William Hooper

Port: Jeddah, S.A.

Description: B.F.O.

Quality:

Specific Gravity @ 15°C	Flash Point
0.9646	190

Viscosity			Water
Red Wood 1 100 F		1000	Trace
Kinematic Vis	cSt @ 50°C	120	
	cSt @ 40°C		

Quantity	Kiloliter	Metric Ton	Long Ton
	3,317.44	3,200.00	3,149.47

The foregoing quality and quantity are correct in every respect.

Chief Engineer /s/ [illegible]_____

Captain_____

Arabian Marine Operating Co., Ltd._____

Sample(s) on board

[Stamped by S.S. WILLIAM HOOPER and by Arabian Marine Operating Co. Ltd. /s/ Y. Uchida]

DIRECT INQUIRIES TO:
EXXON INTERNATIONAL COMPANY
A DIVISION OF EXXON CORPORATION
CONTROLLER'S DEPARTMENT
200 PARK AVENUE
FLORHAM PARK, NJ 07932

UNLESS PAYMENT INSTRUCTIONS ARE INDICATED BELOW, PLEASE REFER TO REVERSE SIDE

TELEPHONE NO. (201) 765-5721
DO NOT SEND PAYMENT TO ABOVE ADDRESS

S/S/ WILLIAM HOOPER & OWNERS

WATERMAN STEAMSHIP CORPORATION
708 RICHARDS BLDG.
NEW ORLEANS, LA. 70112

YOUR ACCT # 100119592

Invoice Number Please Show on Remittance: 115019

Payment due: 11/30/83 Invoice Date: 08NOV83

Original Delivery Location and Date: Jeddah 26OCT83
Title Transfer Location and Date: [Illegible]
[Illegible] Ref.: 11H03
Supplier: 999 Order No.:VOY13
Discharge Port
Delivery Via
ETI REF
Supplier
Nomination
Voyage
Description: Bunker C
Quantity: 4,242.470T
Price: 180.000/T
Net Value: 763,644.60

[Stamped: "Certified and approved for payment WATERMAN STEAMSHIP CORPORATION" /s/ [Illegible] Other stamped notations partially illegible and omitted in printing]

This invoice is based on the receivable, transferred to Exxon International Company, Which Arose from Signed Delivery Receipt No. XXX

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WACOR 423228 9
OCT 27 1983 06310
WACOR 423228

TAA192 IN 27/06:22 OUT 27/06:33

2775 ULA PK

FM ULINERS KARACHI
TO WACORSHIP NEWYORK -38
CC WACORSHIP ATHENS - 60
DI 27/10/83

RELEE/33 DOCUMENTS FORWARDED BY DHL COURI-
ERS UNDER RECEIPT NO.018896
STOP KINDLY ACK RECEIPT.

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2775 ULA P
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WACOR 423228 . . . . .
OCT 27 1983 06380
WACOR 423228
401083 SASHIP SJ

TO: WATERMAN STEAMSHIP CORP. (NEW YORK)
FM: ARABIAN MARINE OPERATING CO. (AMOCO)
JEDDAH

++++++
AMOCO 102707
RE BUNKER SUPPLY TO "WILLIAM HOOPER" CM
CONFIRMING SUPPLIED YR GOOD VSL AS FOLLOWS:-

(1) VSL'S NAME : WILLIAM HOOPER
(2) DATE OF SUPPLY : 26TH OCTOBER 1983
(3) SUPPLIED QTY : BFO 28,000.00BBLS
(4,242.47MT)

TKS AND BEST REGARDS.

-AMOCO-

NNN0
WACOR 423228
401083 SASHIP SJ

REPLY VIA ITT

EXXON MARINE FUEL CONTRACT

No. 77100

THIS CONTRACT is made as of April 8, 1983, between EXXON INTERNATIONAL COMPANY (a division of Exxon Corporation) hereinafter called Seller, of 1251 AVENUE OF THE AMERICAS, NEW YORK, N.Y. 10020, and of WATERMAN STEAMSHIP CORPORATION, hereinafter called Buyer, of 120 WALL STREET, NEW YORK, N.Y. 10005.

Seller agrees to sell or cause to be sold, the marine fuel described below (hereinafter called "Marine Fuel") and Buyer agrees to purchase such Marine Fuel upon the terms and subject to the conditions hereinafter set forth.

ARTICLE I, DURATION

Section 1.1 Sales and deliveries under this Contract shall be made during the period beginning January 1, 1983, and ending December 1983.

ARTICLE II, MARINE FUEL

Section 2.1 The Marine Fuel to be sold hereunder shall be the commercial grades of Bunker Fuel Oil and/or Intermediate Bunker Fuels and/or Marine Diesel Oil and/or Light Marine Diesel Oil and/or Marine Gas Oil offered at the time and place of delivery by Seller or by the Supplying/Delivering Company (hereinafter called Supplying Company), referred to in Section 3.1 hereof. Buyer shall have the sole responsibility for the selection and acceptance of Marine Fuel for use in the vessels to which such Marine Fuel is delivered.

ARTICLE III, QUANTITIES

Section 3.1 Buyer shall, during the period of this Contract, purchase a minimum of 1,200,000 barrels of Marine Fuel, but not more than a maximum of 1,300,000 barrels provided that

such purchases shall be made at an approximately equal quarterly rate during the term of this Contract, (such "quarters" being each of consecutive three-month periods beginning with the date of this Contract); and provided further that during the period of this Contract, the minimum and maximum quantities thereof to be purchased in various geographical areas of the world shall be as shown on Exhibit A annexed hereto (which this and other exhibits as now existing, revised or added by mutual agreement are hereby incorporated herein and made a part of this Contract). Such purchases shall be made at the ports, and be delivered by the Supplying Companies, referred to in Seller's "International Contract Price List for Marine Fuel Delivered as Ships' Bunkers" (hereinafter called "Seller's Price List"), which list is revised and sent to Seller's contract customers from time to time. A copy of Seller's Price List, current as of the date of this Contract, has been provided to Buyer, or will be provided to Buyer on request.

ARTICLE IV, PRICE

Section 4.1 The price of Marine Fuel delivered hereunder shall be the established selling price effective for the time and place of delivery by Seller or Supplying Company, as the case may be, for the grade of Marine Fuel delivered. Buyer shall also pay all applicable duties, taxes, fees and other costs including, without limitation, those imposed by governments and authorities, and barging and other delivery charges, all of which shall be included in Seller's invoices to Buyer.

ARTICLE V, PAYMENT

[Sections 5.1 and 5.2 deleted by parties in the original]

Section 5.3 Payment as defined in Section 5.2 above shall be made either to Seller at Seller's address set forth above or by telegraphic transfer of funds to a bank designated by Seller. Payment shall be deemed to have been made (a) in the case of a direct payment to Seller on the date of receipt of good funds at Seller's said address, or (b) in the case of a telegraphic transfer, on the date the payment is credited to Seller's account at a bank designated by Seller.

ARTICLE VI, DELIVERIES

Section 6.1 Vessels will be bunkered as promptly as circumstances permit but neither Seller not Supplying Company shall be liable for demurrage or any loss due to congestion at the terminal or to prior commitments of available barges.

Section 6.2 Delivery shall be made during working hours unless required at other times (including public or bank holidays, Saturday afternoons and Sunday) and permitted by port regulations, in which event Buyer shall reimburse Seller or Supplying Company for all additional expenses incurred in connection therewith. If a government permit is required for deliveries hereunder, no deliveries shall be made until the permit has been issued to Buyer.

Section 6.3 At ports where barging facilities are available to Seller or Supplying Company at current rates and on reasonable terms, delivery of Marine Fuel hereunder shall be made by barge provided or caused to be provide by Seller or Supplying Company to Buyer's vessel within normal harbor limits as established by Seller or Supplying Company. When deliveries are made by barge, Buyer shall pay the applicable barging charges plus transportation taxes, if any (subject to minimum delivery provision), at port of loading and shall provide steam or pay for tug pumping charges if required to effect delivery. If in Seller's or Supplying Company's judgement the making of a barge delivery or deliveries will cause a labor dispute with, or a strike by, its employees, Seller or Supplying Company may refuse to make such deliveries and Buyer shall be required to provide its own barges.

Section 6.4 At all ports barging provided by or caused to be provided by Seller or Supplying Company shall be charged on not less than ninety per cent (90%) of the quantity ordered or tendered, whichever is less; and Buyer shall also be charged for all additional expenses incurred by Seller or the supplying Company in connection with Buyer's failure to take delivery of the full quantity ordered by Buyer. In the event Buyer fails to take delivery of the full amount ordered or tendered, whichever

is less, of marine fuel either ex barge or ex terminal, Seller will charge Buyer the amount of loss sustained by having to sell the fuel in down-graded form at a lower price than that at which it was ordered.

Section 6.5 If Buyer causes delays to Seller's or Supplying Company's facilities in effecting deliveries, Buyer shall pay demurrage at Seller's or Supplying Company's established rates, and reimburse Seller or Supplying Company for all other expenses in connection therewith.

Section 6.6 In the event Buyer's or Seller's operation at any delivery location where Seller provides services is to be discontinued for any reason, either party shall have the right to cancel this Agreement as to such locations. Said cancellation shall be effective no earlier than the date of written notice to the other party; however, every effort will be made to give at least 30 days notice of such cancellation.

Section 6.7 Additional provisions relating to delivery and other matters appear on the back of this page and are a part of this Contract.

If this Contract is signed by an agent for a principal as Buyer hereunder, then such agent shall be liable not only as agent but also for the performance of all obligations of the principal hereunder.

IN WITNESS WHEREOF, the parties hereto have executed this Contract the day and year first above written.

JES:rk

WATERMAN STEAMSHIP CORPORATION

Buyer

BY_____

EXXON INTERNATIONAL COMPANY

(a division of Exxon Company)

BY_____

EXXON MARINE FUEL CONTRACT

(A) QUANTITY DETERMINATION:

The quantity of Marine Fuel delivered under the Contract shall be determined from the official gauge of the barge effecting delivery or by gauging in Seller's or Supplying Company's shore tank or by Seller's or Supplying Company's oil meter at Seller's or Supplying Company's election. Except where government regulations or local authorities determine otherwise, adjustment in volume owing to difference in temperature shall be made in accordance with API/ASTM-IP Petroleum Measurement Standards for Generalized Products (Table 6B, 24B or 54B depending on port location). In the measurement of Marine Fuel, Seller or Supplying Company shall make allowance for all water and non-petroleum sediment in excess of one per cent (1%). Buyer may be present or represented by properly accredited agent when such measurements are taken, but if Buyer is not present or represented, then Seller's or Supplying Company's determination of quantities shall be deemed to be correct. Buyer may inspect the oil delivered hereunder before it is pumped out of the Seller's or Supplying Company's shore tank or barge. Buyer may inspect the oil delivered hereunder before it is pumped out of the Seller's or Supplying Company's shore tank or barge. Buyer waives any claim against Seller or Supplying Company with respect to the quantity, quality or price of any Marine Fuel delivered under this Contract unless Buyer's claim is submitted to Seller in writing within forty-five (45) days after date of invoice pertaining to the delivery of Marine Fuel with respect to which said claim is made.

(B) COLLECTIONS:

Deliveries of Marine Fuel hereunder are made not only on the credit of the Buyer but also on the faith and credit of the vessel which uses the Marine Fuel and it is agreed that Seller and Supplying Company will have and may assert a lien against such vessel for the amount of the delivered price of said Marine Fuel. Additionally, the Seller and Supplying Company

will have and may assert a lien for the said amount of the delivered price against such vessel, should the laws applicable at the place of Seller's address which is set forth in the beginning of this Contract, at the place of delivery of the Marine Fuel and/or at the place of seizure of such vessel, grant or recognize a lien for Marine Fuel delivered to a vessel. In the event of any breach of this Contract by Buyer, or the default by Buyer in the payment of any indebtedness to Seller, whether such indebtedness arises out of this Contract or otherwise, or in the event Buyer becomes bankrupt or its financial condition becomes unsatisfactory to Seller, then Seller and Supplying Company shall have the right, in addition to any other rights or remedies they may have, to suspend deliveries hereunder, and Seller shall be entitled to terminate this Contract. If at any time a price provided in this Contract shall not then conform to the applicable laws, regulations or orders of a Government or other competent authority, appropriate price adjustments will be made; provided, however, that in the event Seller is at any time prevented from collecting, or Buyer is required to pay more than, the full price provided for in the Contract, including changes in said price pursuant to other provisions hereof, the party adversely affected shall have the option at any time thereafter while such condition exists to cancel this Contract as to any affected delivery location upon thirty (30) days' written notice to the other.

(C) FORCE MAJEURE:

In addition to any other excuses (arising out of the same or other causes) provided by law, no failure or omission by either party to carry out or observe any of the provisions or conditions of this Contract shall give rise to any claim against that party, or be deemed to be a breach of this Contract, if the same shall arise out of causes not reasonably within the control of that party, whether or not foreseen, including (without limitation) such causes as labor disputes, strikes, governmental intervention, or Seller's response to the insistence or request of any governmental instrumentality or person purporting to act therefor, wars, civil commotion, fire, flood, accident, storm or any act of God: and the term "party" when used with reference

to Seller shall also include the Supplying Company, Exxon Corporation and its subsidiary and affiliated companies. Under no circumstances, however, shall Buyer be excused under this paragraph of Buyer's obligation to make payment for all amounts due on account of Marine Fuel previously delivered hereunder. The quantity of Marine Fuel which has not been delivered for the reasons stated in this Section (C) shall be deducted from the quantity or Marine Fuel to be sold and purchased under this Contract. Failure to deliver or accept delivery of Marine Fuel which is excused by, or results from, the operation of this Section (C) shall not extend the term of this Contract.

(D) SHORTAGE OF OIL:

If, as the result of any of the events, matter or things referred to in Section (C), or any other foreseeable or non-foreseeable event, including contractual changes relating to the supply of crude oil and/or petroleum products from which Marine Fuel of the type to be sold hereunder is derived, supplies of Marine Fuel are curtailed, or are available to Seller or supplying Company only under conditions which, in Seller's sole judgement are deemed unacceptable, Seller may allocate, on any fair and reasonable basis according to its own discretion its available supplies of Marine Fuel to meet its own requirements and those of its subsidiaries and affiliated companies and other customers, including Buyer and, at Seller's option, customers not then under contract; and Seller shall not be required to increase supplies from some other source of supply or to purchase Marine Fuel to replace the supplies so curtailed.

(E) DELIVERIES:

Buyer shall give Seller, unless otherwise requested by Seller, at least seven (7) days prior notice of deliveries required, specifying the name of the vessel, vessel's agents, approximate date of delivery, location and method of delivery and grade and quantity of Marine Fuel. Buyer or vessel's local agents shall give to Supplying Company at each port where deliveries are required at least forty-eight (48) hours advanced

notice (unless otherwise stated in Seller's Price List). Sundays and holidays excluded, of the exact quantity required and exact location and time at which delivery is required. Buyer agrees to reimburse Seller or Supplying Company for overtime and/or other additional expenses incurred due to the failure of Buyer, its servants or vessel's local agents to provide Supplying Company with sufficient prior notice of amendments of delivery time, quantity changes or cancellations. Buyer shall make all connections and disconnections between the delivery hose and vessel's intake pipe, and shall render all other necessary assistance and provide sufficient tankage and equipment to receive promptly all deliveries hereunder. At Buyer's request, deliveries will be made alongside Seller's or Supplying Company's dock if facilities for such deliveries are shown to be available in Seller's Price List. In no case shall Seller or Supplying company be liable for any damage or delay resulting from causes beyond their control or avoidable by due care on the part of Buyer or its vessel. All deliveries shall be deemed to be complete and title shall pass to Buyer when the Marine Fuel has reached the flange connecting the delivery facilities provided by Seller or Supplying Company with the receiving facilities provided by Buyer. The Marine Fuel shall be pumped at the risk and peril of Seller or Supplying Company up to that flange only and thereafter Seller or Supplying Company shall not be responsible for any loss or damage. Anything herein contained to the contrary notwithstanding Seller's obligation to make any delivery hereunder is subject to the availability to Seller or Supplying Company at the port at which delivery is requested, of the particular grade of Marine Fuel requested by Buyer. Buyer shall indemnify Seller and Supplying Company against all damage and liabilities arising from any acts or omissions of Buyer or its servants, ships' officers or crews in connection with the delivery of Marine Fuel under this Contract.

(F) ENVIRONMENTAL PROTECTION:

If an escape, spillage or discharge of oil (hereinafter referred to as a "spill") occurs while Marine Fuel is being delivered to Buyer hereunder. Buyer will promptly take such action

as is reasonably necessary to remove the oil and mitigate the effects of such spill. However, notwithstanding the cause of such spill, Seller or Supplying Company is hereby authorized at its option, upon notice to Buyer, or Buyer's operator of, or agent for, the receiving vessel, to take such measures, either in cooperation with Buyer, or exclusively as the sole party, and incur such expenses (whether by employing its own resources or by contracting with others) as are reasonably necessary, in the judgement of Seller or Supplying Company, to remove the oil and mitigate the effects of such spills. If Seller has exercised its option to remove the oil and mitigate the effects of such spill, Buyer agrees to cooperate and render such assistance as is required by Seller in the course of such action. Any expenses, damages, costs, fines and penalties arising from escape, spillage, discharge or pollution of oil shall be paid by the party that caused such escape, spillage, etc. by a negligent act or omission. If both parties have acted negligently, any expenses etc. shall be divided between the parties in accordance with the respective degree of negligence. Buyer also agrees to give or cause to be given, to Seller, all such documents, and other information concerning any spill or any program for the prevention thereof, which are requested by Seller, or required by law or regulation applicable at the time and place where Seller or supplying Company delivers Marine Fuel to Buyer.

(G) MISCELLANEOUS:

Notices hereunder shall be mailed to Seller and to Buyer at the addresses first above given. Either party may change its address by giving fifteen (15) days' prior written notice of its new address to the other party. No waiver by either party of any breach of any of the covenants or conditions herein contained to be performed by the other party shall be construed as a waiver of any succeeding breach of the same or any other covenant or condition. The entire Contract is contained herein and there are no oral understandings, representation or warranties affecting it. Buyer shall not assign any right or delegate any obligation under this Contract without the prior written consent of Seller. No claim shall be made hereunder for indirect or consequential damages. This Contract shall be governed

by the Laws applicable at the place of Seller's address which is set forth at the beginning of this Contract to the exclusion of any other legal system. Each party expressly submits itself to the jurisdiction of the appropriate court pertaining to Seller's address. Said court shall have exclusive jurisdiction of any litigation arising under this Contract. There is no implied warranty of workmanlike performance with respect to this Contract, other than services provided by employees of Seller or Supplying Company in conjunction with the delivery of Marine Fuel as provided for in this Contract. This Contract shall not be modified or amended in any way except in writing by the parties.

AMENDMENT A TO BASIC CONTRACT DATED 08 APR 83

Between Waterman Steamship Corp. and Exxon International Company (a division of Exxon Corporation) Agreement Dated 01 Jun 83

This Amendment Changes Specific Price Concessions at Stated Ports for Certain Products Granted Buyer in Said Contract. The Amended Price Concessions Shown Below May Supersede Certain Price Concessions or Portions Thereof Granted to the Original Contract or Amendments Thereto and Shall Become Effective on the Dates Shown Following Each Numbered Price Concessions Below.

COLOMBO CONCESSIONS RE-INSTATED

No.	Port/County/ Area Designation	Product Abbrev.	Amount of Price Concession	$	D or T	Type	Effective Date	Expiry Date	Item	Special Payment Method
1	Colombo	BFO	4.50	$	T	TA	01 JUN 83	FUFN*	#1	
2	Colombo	BFO	6.50	$	T	TA	01 JUN 83	FUFN*	#2	
3	Colombo	BFO	8.00	$	T	TA	01 JUN 83	FUFN*	#3	

* Firm Until Further Notice
Condition #1 - Minimum Delivery of 1 to 500 Metric Tons
Condition #2 - Minimum Delivery of 501 to 1000 Metric Tons
Condition #3 - Minimum Delivery of 1001 and Over Metric Tons

All Other Terms and Provisions of This Contract Shall Remain Unchanged

Buyer_____ Seller_____

J.A. 30

This Exhibit A is Annexed to and Made a Part of the Marine Fuels Contract

Dated: 08 APR 83 between Waterman Steamship Corporation and Exxon International Company (a division of Exxon Corporation) Covering the Contract

Period 01 JAN 83 through 31 DEC 83 and the Provisions of this Exhibit are Subject to the Terms and Conditions of Such Contract. In Addition to its Own Requirements, Buyer Shall Cause the Following Named Companies to Purchase Their Marine Fuel Requirements Under This Contract as Set Forth Below: [Illegible]

Temporary Allowance Credited with Each Invoice.
Special Prices Invoiced Net.

{ When Buyer's Purchases from Seller's Supplying Companies Meet the Conditions Itemized Below

Buyer Shall be Entitled to the Price Concessions Shown on Subsequent Pages of this Exhibit When Purchases from Seller's Supplying Companies Meet the Itemized Conditions Set Forth Below:

Item	Port/County/ Area Designation	Product Abbreviation	Minimum Volume	Maximum Volume	MB or MT	% of Reqmt.
A	Worldwide	All	1200.0	1300.0	B	

Signed Buyer Seller

J.A. 31

CONTINUATION OF EXHIBIT A TO THE MARINE FUELS CONTRACT

Date 08 APR 83 between Waterman Steamship Corporation and Exxon International Company (a division of Exxon Corporation) covering the period January 1, 1983 through December 31, 1983 the Price Provisions of the Exhibit Shall Become Effective on the Dates shown Following Each Numbered Price Concession, Discounts Shown Below Shall be Deducted from the Prices Prescribed by Section 4.1 of this Contract as Shown in Seller's Price List for the Locations Concerned. When Buyer's Purchases from Seller's Supplying Companies Meet the Itemized Conditions Shown on Preceding Pages of this Exhibit and Referred to by Item Following Each Numbered Price Concession Below, Buyer Shall be Entitled to the Price Concessions Described Below, in the Event Certain of the Price Concessions Granted Below Shall be Credited to Buyer in a Manner Different from the Method Shown on the First Page of This Exhibit, Such Exceptions are Shown below Shall be Credited to Buyer in a Manner Different from the Method Shown on the First Page of this Exhibit, Such Exceptions are Shown Below Under the Heading "Special Payment Method" Following the Particular Numbered Price Concession Concerned.

J.A. 32

Concession Number	Port/ Country/ Area Designation	Product Abbreviation	Amount of Price Concession	B or $ T	Type	Effective Date	Expiry Date	Condition Items	Special Payment Methods
01	USEC-Main Ports	BFO	1.30	$ T	TA	01 JAN 83	FUFN*		
02	USGC-Main Ports	BFO	1.30	$ T	TA	01 JAN 83	FUFN*		
03	USWC-California	BFO	1.30	$ T	TA	01 JAN 83	FUFN*		
04	Eastern Canada-Main Ports	BFO	3.00	$ T	TA	01 JAN 83	FUFN*		
05	Western Canada	BFO	3.00	$ T	TA	01 JAN 83	FUFN*		
06	Singapore	BFO	11.00	$ T	TA	01 JAN 83	FUFN*		
07	Colombo	BFO	3.50	$ T	TA	01 JAN 83	FUFN*	#1	
08	Colombo	BFO	4.50	$ T	TA	01 JAN 83	FUFN*	#2	
09	Singapore	BFO	11.00	$ T	TA	01 JAN 83	FUFN*		

J.A. 33

* Firm Until Further Notice
Condition #1 - Minimum Delivery of 1 to 500 Metric Tons
Condition #2 - Minimum Delivery of 501 Metric Tons and over

This Contract Shall not be Amended or Rescinded without the Prior Written Agreement of the Parties hereto.

CONTINUATION OF EXHIBIT A TO THE MARINE FUELS CONTRACT

Dated: 08 APR 83 between Waterman Steamship Corporation and Exxon International Company (a division of Exxon Corporation)

Remarks:

ARTICLE V - PAYMENT

SECTION 5.2

Payment shall be made as directed by Seller. Until otherwise directed by Seller, Buyer shall pay Seller in U.S. dollars for each delivery of Marine Products to any vessel upon any order (or notice) given by or on behalf of Buyer, wherever delivered, together with barging and any other charges, if any; to Seller. Payment of Seller invoices bearing an invoice date of the ninth through the twenty third of any month is to be received by Seller during the period from the date of invoice to the fifteenth day of the following month. Payment of Seller's invoices bearing an invoice date of the twenty-fourth through the eighth day of the following month shall be received by Seller during the period from the date of invoice to the last day of the following month. A service charge shall accrue to Seller at the rate of 2% per month from the end of the respective period to the date payment is received by Seller and shall be payable as directed by Seller. Seller reserves the right to modify or terminate credit arrangements upon notice to Buyer.

Buyer_____ Seller_____

[Excerpt of deposition of Edward J. Matters attached as Exhibit 15 to Paré Affidavit filed 5/31/88]

and not supplying any longer.

Actually, there come a point in time in mid-October when they weren't — there were two nominations pending at Jeddah and Arabian Marine got tough and said they were not going to supply them at that point in time.

Q. Excuse me for one second.

A. Okay.

Q. Did you personally have those conversations?

A. With Hakim, yes.

Q. Who is Hakim?

A. Hakim is an Arabian Marine Operating Company representative in London.

Q. He personally informed you?

A. Yes.

Q. What was that again?

A. That they would, unless Waterman paid a substantial amount of the overdues they were not going to supply any more ships of Waterman's for their own account.

Q. Were there any pending bunker deliveries at that point?

A. There were two at the time. One was the STONEWALL JACKSON and the other one was the WILLIAM HOOPER. They were pretty close together in mid — end of October time frame.

Q. How imminent was the first of those deliveries?

A. The first one was very close as I recall. I think the delivery ultimately took place on the 19th, and we had about a day's notice to make a decision whether or not to accept the business back as Exxon's business and accept the credit risks or delay the ship.

Q. What did you do then after you received that telephone call?

A. This was only a report to the salespeople who had Waterman's other business and to our treasury people who were concerned about the financial status of Waterman. They presumably sat down and had a meeting and decided okay, we will take the STONEWALL JACKSON because of the potential for delaying the ship and we wanted to continue to service Waterman so we accepted the STONEWALL JACKSON delivery and told Arabian Marine they can go ahead and deliver that for our account.

We told them we had not made a decision on the next one, the WILLIAM HOOPER, but we will get back to them on that.

Q. Did somebody tell you that your company would accept?

A The treasurer.

Q. The STONEWALL JACKSON delivery?

A. My recollection is that the treasurer's people

* * *

Q. KB standard for a thousand barrels?

A. Thousand barrels, and then similar for the WILLIAM HOOPER. The estimated delivery date would have been the

25th and they were looking for 28,000 barrels, and that would have been about $765,000.

Q. There is writing in the far right-hand side of this paper; is that yours?

A. No, it is not. I am presuming it is Jim Sharkey's, but I don't know.

Q. "Please tell Ron we have accepted his JACKSON."

A. Yes. This was for Jim Sharkey, the salesman, to bill Waterman, we were going to take the STONEWALL JACKSON deliver because he, Ryan, was talking with Hakim in London, and Hakim was telling him we were not delivering.

Q. Telling Ryan that?

A. Telling Ryan that. It was to allay Mr. Ryan's fears that the ship would be delivered, that we were going to accept the credit risk and make the delivery.

Q. And —

A. Then I told Mr. Hakim —

Q. This entry, speaking today with Hakim —

A. Ryan.

Q. And the bottom entry?

A. To let him know I had also spoken to Hakim in London saying that we would take the JACKSON, but we had not made any decision about the others at this point in time.

Q. In your conversation with Hakim, was it the same day of the preparation of this memo?

A. That's correct.

receivable security such as letter of credit or personal guarantee. Waterman did not raise objection and re-emphasized their good banking relationship and offered to arrange high level contact at Manufacturers Hanover Bank to satisfy Exxon needs.

- November 7th (Monday) - Exxon (Sharkey) called Waterman to confirm bank contact arrangements since Exxon wished to commence dialogue with Manufacturers Hanover Bank. Waterman (Ryan) reported that arrangements had not been made. Exxon's Treasurers (Rudzki) called Waterman's V.P. Finance (B.F. Sauer) to reiterate Exxon's request for security.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EXXON CORPORATION, Plaintiff, -against- CENTRAL GULF LINES, INC. *in personam* and the M/V GREEN HARBOUR (ex WILLIAM HOOPER) *in rem*, her engines, boilers, tackle, etc. and a certain letter of Credit No. P 621208 dated December 26, 1984 issued by the Chase Manhattan Bank, N.A., *in rem*., Defendants.	REPLY AFFIDAVIT IN FURTHER SUPPORT OF EXXON MOTION FOR SUMMARY JUDGMENT 86 Civ. 9445 (WCC)

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

ARMAND M. PARÉ, JR., being duly sworn, deposes and states:

1. I am counsel to the firm of Nourse & Bowles, attorneys for plaintiff, Exxon Corporation ("Exxon"). I make this affidavit in reply to answering papers submitted by defendant, Central Gulf Lines, Inc. ("Central Gulf") and in opposition to cross-motion of Central Gulf.

2. Central Gulf's answering papers make the unsupportable conclusionary allegation that the delivery of fuel oil made to the vessel WILLIAM HOOPER at Jeddah on

October 26, 1983 was the result of Waterman Steamship Corp. ("Waterman") having ordered the fuel oil via the Exxon "Mariner" communications system on September 29, 1983. The unrebutted evidence already introduced shows this to be incorrect and shows that the local fuel oil supplier, Arabian Marine Operating Co., Ltd. ("Arabian Marine") refused to honor Waterman's September 29, 1983 order for fuel oil. The previously submitted and unrebutted evidence shows that Arabian Marine only agreed to supply bunkers on the strength of a subsequent order made by Exxon. Attached hereto as Exhibit "1" are three pages of Mr. Sharkey's transcript (pp. 55-56 and 65) evidencing that Exxon even reordered the bunkers from Arabian Marine through the Exxon "Mariner" communication system for the WILLIAM HOOPER and the STONEWALL JACKSON. Attached as Exhibit "2" is a copy of the Mariner cable referred to in Exhibit "1" for the WILLIAM HOOPER, which document was produced to Central Gulf pursuant to its request contained in Exhibit "1".

3. Attached as Exhibit "3" are pages 88-92 of the transcript of Mr. Rudzki regarding prior lien claims with which Exxon has been involved.

4. Attached as Exhibit "4" are pages 47-48 of the transcript of Mr. Rudzki showing that no one at Exxon was know to have been aware of the prohibition lien clause in Central Gulf/Waterman charter.

5. In addition to the Jeddah Delivery, Exxon made a delivery of gas oil to the Vessel at New York on October 7, 1983 (the "New York Delivery"). Central Gulf does not deny the fact of the New York Delivery but apparently seeks to avoid summary judgment by making the point that the delivery receipt for the New York Delivery has not been produced. This document has never been located despite diligent search. Obviously, the inability to produce a document which cannot be located, especially when it is only cumulative of other uncontested evidence, is not a bar to summary judgment. As indicated in Exhibit "5", the New York Delivery was physically

made by Exxon Company U.S.A., which is an unincorporated division of Exxon Corporation.

/s/ Armand M. Paré

Sworn to before me this
20th day of July, 1988

/s/ Mary T. Bannon

[Notary Stamp]

TO: BIGHAM, ENGLAR, JONES & HOUSTON
Attorneys for Defendant
Central Gulf Lines, Inc.
14 Wall Street
New York, New York 10005
(212) 732-4646

[Excerpt of deposition of Adam V. Rudski attached as Exhibit 3 to Paré Reply Affidavit filed 7/21/88]

Correct that to the BENJAMIN HARRISON.

MR. LAUGHLIN: what is the date of that?

MR. PARÉ: November 8.

(Whereupon, delivery receipt for the BENJAMIN HARRISON is marked as Exxon Exhibit B for identification)

Q. Sir, the account party there is Messrs. Exxon International?

A. That's correct.

Q. Is that the way that the bunker receipt should read?

A. Yes.

Q. That's how the other three should have read?

A. That's how the others should have read. At the time we made those deliveries they were made on Exxon's account.

Q. What is your title?

A. I am a section head in domestic credit and financial operations.

Q. What is the function of your section?

A. The function of my section is to manage accounts receivable, that is to evaluate credit, make sure that the collections are made and follow up on any problems that may exist in the various business lines that Exxon International sells to.

Q. Have you — have you or your department had any experience in enforcement of your bunker supplies through maritime liens?

A. Yes.

Q. Could you tell us what experience you had?

A. Well, in the last approximately five years that I have been with the treasurer's, in this job in the treasurer's function, we have made — we have collected under the maritime liens from States Steamship, a company in California that filed for Chapter 11.

Q. Who did you collect from in that case?

A. From Lykes Brothers.

What happened was the ship was transferred from States to Lykes and the maritime lien went with the vessel.

And we then threatened — we then threatened Lykes with the fact we will arrest the ship, and they have paid us.

MR. O'BRIEN: I will object to this whole line of questions. Different circumstance, different place, has no relevancy to this matter at all.

MR. LAUGHLIN: I move to strike.

Q. Did you have a credit check done in that case?

A. Yes.

You also asked if we have any other experiences and I can recall four other customers. We have bulk food carriers who — also similar situation to States Steamship.

We had Cleaver Trading which is — which was a customer in Denmark, and whose vessels were on time charters from Japanese owners. We had arrested or threatened to arrest vessels and we were paid.

MR. O'BRIEN: For once you are going to run out of luck.

Q. Any other incidents?

A. Then there was —

MR. O'BRIEN: We will be here all day. He is going into these totally unrelated incidents. He is talking about Denmark.

A. There was Dolphin Maritime, whose principal was a U.S.-Greek owner, who has paid us after the arrest of the vessel in New York.

There was — there were others. I don't recall. Ipris, another old Greek account, where again we arrested one ship threatened to arrest another. We also got paid.

Q. Does the name Bulk Foods refresh your recollection?

A. I mentioned Bulk Food, I think already which is similar. They were Chapter 11 bankruptcy or under the old code I guess.

Q. In those cases where you collected from a third party, had you or an affiliate made credit checks of the original customer?

A. Yes, for the Danish company, this was not our customer directly here in New York, but their were credit checks made by the office that did the actual selling, and certainly when it came to the bankruptcy or to inability to pay, we used the maritime liens.

Q. Sir, referring you to Central Gulf's Exhibit 10 and specifically to —

MR. LAUGHLIN: Are you finished with that line of questioning?

MR. PARÉ: Just about. You going to move to strike it?

MR. LAUGHLIN: Yes.

MR. O'BRIEN: I join in that request.

Q. What was your understanding on December 6 as to Exxon's rights, maritime lien rights against the Central Gulf vessels?

MR. LAUGHLIN: objection, calls for a legal conclusion.

MR. O'BRIEN: The man is not a lawyer.

Q. What was your understanding?

A. My understanding was that we will have and do have a maritime lien to arrest the vessels, since it was not part of the Waterman's estate and that we can assert our maritime lien.

In fact our concern was not so much whether we can, at least my understanding of it was we were not concerned whether we can or not assert the maritime lien. To me that was given. The concern was whether Central Gulf will have the ability to pay.

MR. O'BRIEN: This — I have a continuing objection. You are asking the witness to state an answer which is the very question put to the judge.

Q. And your understanding on December 6th was reflected in Page 2 of Central Gulf Exhibit —

A. That's correct, we have summarized that to our senior management.

Q. When you prepared Central Gulf Exhibit 10 did you consult with an attorney in connection with the preparation of that document?

A. Not specifically in the preparation of this document.

Q. Do you or your office have any contact with Central Gulf?

A. Yes. I have had contact with Central Gulf in the treasurer's function over the years.

Q. And could you describe how that connection takes place?

A. I have had a number of telephone conversations, as I said, over the years with Paul Morrison, the treasurer of

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EXXON CORPORATION,	
Plaintiff,	REPLY AFFIDAVIT
-against-	IN FURTHER SUPPORT OF
CENTRAL GULF LINES, INC. *in personam* and the M/V GREEN HARBOUR (ex WILLIAM HOOPER) *in rem*, her engines, boilers, tackle, etc. and a certain letter of Credit No. P 621208 dated December 26, 1984 issued by the Chase Manhattan Bank, N.A., *in rem*.,	CENTRAL GULF'S MOTION FOR SUMMARY JUDGMENT 86 Civ. 9445 (WCC)
Defendants.	

State of New York)
) SS.:
County of New York)

FRANCIS A. MONTBACH, being duly sworn, deposes and says:

1. I am a member of the bar of this Court and a member of the firm BIGHAM ENGLAR JONES & HOUSTON attorneys for defendant, Central Gulf Lines, Inc. et al. and having handled this matter since its inception am fully familiar with all the facts and proceedings heretofore and herein. I make this affidavit in reply to answering papers submitted by plaintiff, Exxon Corporation (hereinafter Exxon) and in opposition to plaintiff's Motion for Summary Judgment.

2. In its answering papers, Exxon claims that it did not waive its alleged right to a maritime lien and relied on the credit of the vessel. The facts, however, clearly contradict this allegation. The evidence already introduced shows that Exxon relied solely on the credit of Waterman Steamship Company (hereinafter "Waterman") when it facilitated the supply of bunker fuel oil to the WILLIAM HOOPER on October 26, 1983 at Jeddah. In addition to the already submitted evidence, defendants submit Adam V. Rudzki's Deposition Testimony evidencing that Exxon continuously monitored Waterman's financial situation prior to, at the time of and after the disputed delivery of bunker fuel oil. Attached as Exhibit "EE" are pages 27–29 of the transcript of Mr. Rudzki's deposition.

/s/ Francis A. Montbach

Francis A. Montbach

Sworn to before me this
1st day of August, 1988

/s/
Notary Public

[Notary Stamp]

TO: Nourse & Bowles
Attorneys for Plaintiff
Exxon Corporation
One Exchange Plaza
at 55 Broadway
New York, New York 10006

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EXXON CORPORATION, Plaintiff, -against- CENTRAL GULF LINES, INC. *in personam* and the M/V GREEN HARBOUR (ex WILLIAM HOOPER) *in rem*, her engines, boilers, tackle, etc. and a certain letter of Credit No. P 621208 dated December 26, 1984 issued by the Chase Manhattan Bank, N.A., *in rem.*, Defendants.	JUDGMENT 86 Civ. 9445 (WCC)

WHEREAS, on May 24, 1988 plaintiff Exxon Corporation ("Exxon") filed a motion for summary judgment seeking the principal amount of $763,644.60 for supplying certain bunker fuel oil to the vessel M/V GREEN HARBOUR (ex WILLIAM HOOPER) at Jeddah, Saudi Arabia in October, 1983 and the principal amount of $13,241.63 for supplying certain marine diesel oil to said vessel at New York in October, 1983;

AND WHEREAS on June 22, 1988 defendant Central Gulf Lines Inc. ("Central Gulf") filed a cross motion for summary judgment seeking dismissal of plaintiff's two claims;

AND WHEREAS on March 3, 1989 the Court issued an Opinion and Order dismissing plaintiff's claim in the amount of $763,644.60 with respect to the Jeddah, Saudi Arabia supply and granting plaintiff's claim in the amount of $13,241.63 with respect to New York supply;

AND WHEREAS on March 13, 1989 Exxon filed a motion for reconsideration of the Court's Opinion and Order dated March 3, 1989;

AND WHEREAS on July 21, 1989 the Court issued an Opinion and Order denying Exxon's motion for reconsideration of the Court's Opinion and Order dated March 3, 1989,

NOW, THEREFORE,
IT IS HEREBY ORDERED,
ADJUDGED AND DECREED,
that:

1. Plaintiff's claim pertaining to the supply at Jeddah, Saudi Arabia in the amount of $763,644.60 is hereby dismissed.

2. Plaintiff's claim pertaining to the supply at New York in the principal amount of $13,241.63 is hereby granted with interest on that amount at 9% per annum from October 7, 1983 to September 15, 1989 in the amount of $7,078.67 for a total judgment of $20,320.30.

3. Exxon shall recover taxable costs in this action.

4. Exxon shall recover post-judgment interest on this judgment in accordance with 28 U.S.C. § 1961.

Dated: New York, New York
September 15, 1989

/s/ William C. Conner
U.S.D.J. 9/15/89

[Typed Notation: THIS DOCUMENT WAS ENTERED ON THE DOCKET ON 9/15/89.]

Notation Pursuant to Paragraph 2(c) of the Clerk's Memorandum Concerning Printing the Joint Appendix

The following orders and opinions have been omitted in printing this joint appendix because they appear on the following pages in the appendices to the printed Petition for a Writ of Certiorari:

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Summary Order of the United States Court of Appeals for the Second Circuit dated April 5, 1990 affirming the judgment of the district court A-1

Opinion and Order of the United States District Court for the Southern District of New York dated July 21, 1989 denying Exxon Corporation's Motion for Reconsideration of the Court's Opinion and Order dated March 3, 1989..... A-3

Opinion and Order of the United States District Court for the Southern District of New York dated March 3, 1989 ..... A-22

FILED
FEB 28 1991
OFFICE OF THE CLERK

No. 90-34

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

EXXON CORPORATION,

Petitioner,

— v. —

CENTRAL GULF LINES, INC., *in personam*, and the M/V GREEN HARBOUR (ex WILLIAM HOOPER), *in rem*, her engines, boilers, tackle, etc. and a certain Letter of Credit No. P 621208 dated December 26, 1984 issued by the Chase Manhattan Bank, N.A., *in rem*,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER EXXON CORPORATION

ARMAND MAURICE PARÉ, JR.
Counsel of Record

BRADLEY F. GANDRUP, JR.

NOURSE & BOWLES
Counsel for Petitioner
One Exchange Plaza
At 55 Broadway
New York, New York 10006
(212) 952-6200

QUESTIONS PRESENTED

1. Should this Court resolve the direct conflict among the Second, Fifth, Ninth and Eleventh Circuits and establish a uniform rule concerning whether admiralty jurisdiction exists on claims by agents who procure necessary marine services and/or supplies for vessels in the maritime commerce of the United States?

2. Should this Court overrule, or at least limit, its much criticized one page opinion in *Minturn v. Maynard*, 58 U.S. (17 How.) 477 (1855), which refused to recognize admiralty jurisdiction on a suit involving an agency contract calling for necessary marine services and supplies to be delivered to a vessel in the maritime commerce of the United States?

LIST OF PARTIES

The parties to the proceedings below are those set forth in the caption. Petitioner, Exxon Corporation, has no corporate parent. In accordance with Rule 29.1 of the Rules of the Supreme Court of the United States, Petitioner annexed as Appendix D to its Petition for a Writ of Certiorari, a list of the subsidiaries which Exxon Corporation directly or indirectly owns by less than one hundred per cent (Pet. App. A36-A47). A revised list has been filed with the Clerk's Office.

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No. 90-34

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

EXXON CORPORATION

Petitioner,

— v. —

CENTRAL GULF LINES, INC., *in personam,* and the M/V GREEN HARBOUR (ex WILLIAM HOOPER), *in rem,* her engines, boilers, tackle, etc. and a certain Letter of Credit No. P 621208 dated December 26, 1984 issued by the Chase Manhattan Bank, N.A., *in rem,*

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER EXXON CORPORATION

OPINIONS BELOW

The Summary Order of the United States Court of Appeals for the Second Circuit was not reported but is reprinted in Appendix A to the Petition for a Writ of Certiorari. (Pet. App. A1-A2).

The opinions of the United States District Court for the Southern District of New York are reported at 717 F. Supp. 1029 and 707 F. Supp. 155 and are reprinted in Appendices B and C to the Petition for a Writ of Certiorari (Pet. App. A3-A35).

JURISDICTION

The Order of the United States Court of Appeals for the Second Circuit was entered on April 5, 1990. Exxon Corporation filed a Petition for a Writ of Certiorari on July 3, 1990. The Petition for a Writ of Certiorari was granted on January 14, 1991. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1) (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, article III, section 2, clause 1, provides that:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; —to all Cases affecting Ambassadors, other public ministers and Consuls; —to all Cases of admiralty and maritime Jurisdiction; —to Controversies to which the United States shall be a Party; —to Controversies between two or more States; —between a State and Citizens of another State; —between Citizens of different States, —between Citizens of the same State claiming Lands under Grants of different States, and between a State, the Citizens thereof, and foreign States, Citizens or Subjects.

The Judicial Code, 28 U.S.C. § 1333 (1964) (corresponds to The Judiciary Act of 1789, Section 9, 1 Stat. 76-77), provides that:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.
>
> (2) Any prize brought into the United States and in all proceedings for the condemnation of property taken as prize.

Section 971 of the Federal Maritime Lien Act, 46 U.S.C. (1982 & Supp. V 1987) (now re-codified at 46 U.S.C. §§ 31341-42), provides:

> Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.

The Judicial Code, 28 U.S.C. § 2106 (1976), provides that:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

STATEMENT OF THE CASE

I. The Facts

Respondent Central Gulf Lines, Inc. ("Central Gulf") was at all material times the owner of the United States flag cargo vessel M/V GREEN HARBOUR (ex WILLIAM HOOPER) (the "Vessel") (J.A. 12). Central Gulf bareboat chartered[1] the Vessel to Waterman Steamship Corporation ("Waterman") for use in Waterman's United States flag commercial liner service between ports in the United States and the Middle East, including Saudi Arabia (J.A. 12-13).

Exxon Corporation ("Exxon") was the supplier to Waterman of marine fuel oil for many years (J.A. 58-59). Under annually negotiated fuel oil supply contracts between Exxon and Waterman, Exxon provided marine fuel to all Waterman ships on a worldwide basis, either itself, or in locations where Exxon did not have its own bunker stations, through local supplying companies (J.A. 58-59, 22-23, 26-27). These fuel supply contracts, including the one covering the year in which the delivery in question was made, 1983 (J.A. 20-34), specifically provided that Exxon would have a lien on the receiving vessel for fuel supplied (J.A. 24-25).

Prior to January, 1982, Exxon supplied fuel under these contracts to Waterman at Jeddah, Saudi Arabia, through Exxon's local supplier, Arabian Marine Operating Co., Ltd. ("Arabian Marine") (J.A. 59-60). In January, 1982, Waterman, in order to take advantage of certain price discounts not available from Exxon in Saudi Arabia, ceased purchasing fuel from Exxon there under the annual fuel contracts, and

---

[1] A bareboat charter is a contract where the charterer takes over the complete crewing, supplying and operating of a vessel becoming, in effect, the owner *pro hac vice*. G. Gilmore & C . Black, *The Law of Admiralty* 194 (2d ed. 1975).

began purchasing fuel directly from Arabian Marine under arrangements made separately between Waterman and Arabian Marine (J.A. 60, 63, 109). Waterman continued to purchase fuel from Exxon elsewhere than in Jeddah under the annual fuel supply contracts.

In early October 1983, Arabian Marine, because of financial difficulties being suffered by Waterman, refused to make further deliveries to Waterman at Jeddah (J.A. 60, 35, 49-51, 135). Exxon agreed to resume deliveries to Waterman at Jeddah under the annual fuel supply contracts, but on an individual, case by case basis (J.A. 61, 128). To effect deliveries at Jeddah, Exxon relied on previously existing contractual arrangements with Arabian Marine, to physically supply fuel there (J.A. 61). Under Exxon's existing arrangements with Arabian Marine, Arabian Marine would invoice Exxon, which would pay Arabian Marine the price of the fuel (J.A. 108, 120-121, 61). Exxon, in turn, would invoice Waterman, which was to pay Exxon (J.A. 61). This method was actually followed for a delivery by Exxon to Waterman at Jeddah prior to the delivery in question (J.A. 56-57, 60-61).

On October 7, 1983, Exxon itself physically supplied marine diesel oil to the Vessel at New York (the "New York Delivery") where it had its own bunker station (J.A. 62, 138-139). Exxon invoiced Waterman for this delivery but was not paid (J.A. 65).

On October 26, 1983 Exxon effected delivery of fuel oil to the Vessel at Jeddah (the "Jeddah Delivery") using Arabian Marine as the physical supplier (J.A. 15, 16, 140). Exxon was invoiced by Arabian Marine for the Jeddah Delivery (J.A. 70, 99-100) and Exxon paid the invoice (J.A. 56-57). Exxon thereafter invoiced Waterman (J.A. 17), but Exxon was not paid (J.A. 62).

Shortly thereafter, on December 1, 1983, Waterman filed for protection under Chapter 11 of the Bankruptcy Code (J.A. 14).

II. The Proceedings Below

Exxon commenced this litigation to enforce *in rem* maritime lien claims against the Vessel for the amounts due on the New York Delivery and Jeddah Delivery. Exxon brought suit under both the General Maritime Law and provisions of the Federal Maritime Lien Act which, at the time, were contained at 46 U.S.C. §§ 971 *et seq.* (1982 & Supp. V. 1987) (now re-codified at 46 U.S.C.A. §§ 31305–7, 31341-42). Exxon later moved for summary judgment arguing that United States law applied and that it was entitled to judgment as a matter of law. Central Gulf cross-moved for summary judgment.

In an opinion and order dated March 3, 1989 (Pet. App. A22-A35), the district court ruled that United States law applied. In addressing Exxon's lien claims, the court focused on the terms of the underlying contractual relationship between Exxon and Waterman. The court did not question admiralty jurisdiction over Exxon's lien claim for the New York Delivery on the ground that Exxon itself physically made this delivery (Pet. App. A33-A34). The Court granted judgment in favor of Exxon on that claim. *Id.* The court concluded, however, that Exxon acted as an agent with respect to the Jeddah Delivery because Arabian Marine, and not Exxon, had physically made the delivery (Pet. App. A27-A32). It held that Exxon's claim for the Jeddah Delivery was therefore outside admiralty jurisdiction and dismissed its claim, relying on the Second Circuit's decision in *Peralta Shipping Corp. v. Smith & Johnson (Shipping) Corp.*, 739 F.2d 798 (2d Cir. 1984), *cert. denied*, 470 U.S. 1031 (1985) and this Court's decision in *Minturn v. Maynard*, 58 U.S. (17 How.) 477 (1855). (Pet. App. A27-A32).

Exxon moved for reconsideration by the district court with respect to the Jeddah Delivery. Exxon argued, *inter alia*, that it was entitled to recover on its lien claim for the Jeddah Delivery on the following grounds: (i) Exxon was, on the facts, a seller and not an agent; (ii) if an agent, Exxon was a "special" agent as opposed to a *Minturn/Peralta* general agent;

and (iii) whether a seller or an agent, Exxon advanced funds (which are themselves necessaries) without which the Vessel would not have been supplied. In an opinion and order dated July 21, 1989, the district court denied Exxon's motion for reconsideration, again based on the Second Circuit's decision in *Peralta* and this Court's decision in *Minturn* (Pet. App. A3-A21).

In a Summary Order dated April 5, 1990, the Second Circuit affirmed the judgment of the district court "substantially for the reasons given" in the two district court opinions (Pet. App. A1-A2).

Exxon petitioned this Court for a Writ of Certiorari on July 3, 1990, within 90 days, as required by 28 U.S.C. § 2101(c) and Rule 13.1 of the Rules of the Supreme Court of the United States. On October 1, 1990 the Court entered an Order inviting the Solicitor General to file a brief expressing the views of the United States. On December 17, 1990, the Solicitor General filed a brief recommending that the Petition for a Writ of Certiorari be granted. The Petition for a Writ of Certiorari was granted on January 14, 1991.

Exxon respectfully seeks an order that the judgment below denying admiralty jurisdiction as to the Jeddah Delivery be reversed and an order directing that the district court enter judgment in favor of Exxon for the amount due on its lien claim respecting the Jeddah Delivery.

Summary of the Argument

The decision below was based on this Court's 1855 decision in *Minturn v. Maynard*, 58 U.S. (17 How.) 477 (1855). *Minturn* has come to stand for the proposition that general agency contracts, including those that call for the husbanding of vessels (that is arranging and sometimes paying for necessary vessel services and supplies), are outside federal admiralty jurisdiction. Commentator criticism of the *Minturn* rule and its progeny has been particularly harsh and there is virtually universal agreement that claims under general agency

contracts should be within admiralty jurisdiction. Similar criticism has even been voiced by those appellate courts which have found themselves compelled to follow *Minturn*. *See infra*, p. 12.

The *Minturn* decision itself is a short, page-length opinion, which does not indicate its underlying legal basis. However, analysis of the facts and arguments in *Minturn* and the jurisdictional tenets existing at the time of that decision, demonstrates that *Minturn* was based on principles long since abandoned.

Specifically, *Minturn* was based on vestiges of the restrictive English jurisdictional views that derived from arbitrary writs of prohibition issued by the English common law courts. These vestiges were: (1) a contract must be performed at least substantially on the sea to be considered a maritime contract; (2) admiralty jurisdiction was available only if an *in rem* lien existed; (3) if common law jurisdiction and/or a common law remedy were available, admiralty jurisdiction would be foreclosed; (4) no admiralty court could award equitable relief, such as an accounting, and (5) if an advance of marine necessaries was secured by other credit arrangements, admiralty jurisdiction might not exist. Legal developments since *Minturn* have, however, thoroughly repudiated each and every one of these principles.

Moreover, this Court's later decision in *The Kalorama*, 77 U.S. (10 Wall.) 104 (1869), distinguished and questioned *Minturn*. The facts in *The Kalorama* were similar to those in *Minturn*, except for the finding in *The Kalorama* that there had been an "express understanding" in that case that the repairs and supplies had been "made and furnished on the credit of the steamer." *Id*. at 214. In *The Kalorama*, the Court found admiralty jurisdiction existed and recognized a lien. There is a provision in the Exxon contract expressly providing that supplies are made "on the faith and credit of the vessel" (J.A. 24-25). The *Kalorama* result should therefore control the case at bar.

Minturn has also caused confusion and disagreement among the circuit courts which are sharply divided over whether to follow *Minturn*. They have created what have been called "hair splitting" distinctions in an effort to avoid its irrationality. Some courts have adopted a "special agency" exception to the "general agency" rule. The special/general agency distinction is particularly inapt since it excludes from jurisdiction the contract which provides the *greater* benefit to maritime commerce.

This Court has recently observed in admiralty tort cases that the purpose underlying the existence of federal maritime jurisdiction is the federal interest in the protection of maritime commerce. *Sisson v. Ruby*, __U.S.__ , 110 S.Ct. 2891 (1990); *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982). For this same reason, commentators have argued that this Court should draw "into the jurisdiction all torts *and contracts* having principally to do with maritime commerce" thereby "fram[ing] a new rationality in the law of admiralty jurisdiction." G. Gilmore & C. Black, *The Law of Admiralty* 31 & n.98g (2d ed. 1975) (emphasis added).

The annual fuel supply contract involved here provided for and resulted in the supply of a vital ship need when the local supplier refused to make the supply. Even accepting the lower court's characterization of this contract as one of agency, it is difficult to think of a contract more intimately related to maritime commerce than the fuel supply contract in question.

The decision below ruling that Exxon's claim was outside admiralty is contrary to modern principles of jurisdiction developed by this Court, culminating in its recent decisions which recognize that the heart of admiralty jurisdiction is the protection and promotion of maritime commerce. The *Minturn* rule that led to the decision below should be overruled. At the very least, it should be held inapplicable to the Exxon fuel supply contract in this case, under which Exxon effected, advanced its credit, and paid for the fuel supply in question.

I.

The Minturn Rule Has Been Widely and Justly Condemned

The decision below held that Exxon's claim respecting the Jeddah Delivery was outside admiralty jurisdiction based on *Minturn v. Maynard*, 58 U.S. (17 How.) 477 (1855). This Court's one page, 1855 decision in *Minturn* states, in full:

> The respondents were sued in admiralty, by process *in personam*. The libel charges that they are owners of the steamboat Gold Hunter; that they had appointed the libellant their general agent or broker; and exhibits a bill, showing a balance of accounts due libellant for money paid, laid out, and expended for the use of respondents, in paying for supplies, repairs, and advertising of the steamboat, and numerous other charges, together with commissions on the disbursements, &c.
>
> The court below very properly dismissed the libel, for want of jurisdiction. There is nothing in the nature of a maritime contract in the case. The libel shows nothing but a demand for a balance of accounts between agent and principal, for which an action of assumpsit, in a common law court, is the proper remedy. That the money advanced and paid for respondents was, in whole or in part, to pay bills due by a steamboat for repairs or supplies, will not make the transaction maritime, or give the libellant a remedy in admiralty. Nor does the local law of California, which authorizes an attachment of vessels for supplies or repairs, extend to the balance of accounts between agent and principal, who have never dealt on the credit, pledge, or security of the vessel.
>
> The case is too plain for argument.

> The judgment of the court of admiralty, dismissing the libel for want of jurisdiction, is affirmed with costs.
>
> *Id.*

Minturn has long been cited for the rule that general agency contracts, including those that call for the husbanding of vessels (that is arranging and sometimes paying for necessary vessel services and supplies), are outside admiralty jurisdiction. In *E.S. Binnings v. M/V Saudi Riyadh*, 815 F.2d 660, 664 (11th Cir. 1987), the Eleventh Circuit gave a more complete description of the services performed under a general agency contract. The court noted such services might include:

> . . .coordinating vessel husbanding services, collecting documents and providing the necessary cargo-related documents for the cargo, soliciting cargo, responding to requests for information regarding arrival of vessels, freight rates and availability of vessels to carry particular cargo, collecting freights, remitting those freights to the principal, handling the flow of funds, including cash disbursements to the master and payment of the principal's bills, accounting and documentation services, clearing of vessels calling in the ports, attending to the needs of the crew and arranging tug service.

The services provided by general agents, including husbanding agents who provide and sometimes pay for essential vessel services and supplies, are essential to maritime commerce.

The *Minturn* holding that claims under such general agency contracts are outside admiralty jurisdiction has been thoroughly repudiated in light of modern decisions. Leading commentators have said of the *Minturn* rule: "[i]t is predicted that the Supreme Court, when the issue reaches it, will hold 'general agency' and other vessel-management agreements within the jurisdiction—along with actions for accountings on

them." G. Gilmore & C. Black, *The Law of Admiralty* 28, n. 94b (2d ed. 1975) (treatise hereinafter cited as "*Gilmore & Black*"). Similarly, Professor Moore has said: "[q]uite clearly, such agreements [agency and brokerage contracts] are an integral part of and in furtherance of, maritime commerce and, consequently, should be cognizable within the admiralty jurisdiction of the district courts." 7A J. Moore & A. Palaez, *Moore's Federal Practice* ¶ .250 at 3003 & 3006 (2d ed. 1988) (treatise hereinafter cited as "7A *Moore's Federal Practice*").

Appellate court criticism of the *Minturn* rule has been equally harsh. In fact, the Second Circuit, which has "faithfully adhered to the *Minturn* holding" has stated that, while "we are not free to anticipate the Supreme Court's overruling of *Minturn v. Maynard . . . we would welcome it.*" *Peralta Shipping Co. v. Smith & Johnson (Shipping) Corp.*, 739 F.2d 798, 802, 804 (2d Cir. 1984), *cert. denied*, 470 U.S. 1031 (1985) (emphasis added). The Eleventh Circuit has also followed *Minturn*, despite recognizing that it has been "condemned by commentators" because only the "Supreme Court is the appropriate court" to overrule *Minturn*. *E.S. Binning, Inc. v. M/V Saudi Riyadh*, 815 F.2d 660, 665 n.4 (11th Cir. 1987).

This Court recently "unanimously agreed that the purpose underlying the existence of federal maritime jurisdiction is the federal interest in the protection of maritime commerce. . . . " *Sisson v. Ruby*, __U.S.__, 110 S.Ct. 2892, 2896 n.2 (1990) *citing Foremost Insurance Co. v. Richardson*, 457 U.S. 668, 674-675, 679-680 (1982). Justice Blackmun summarized the irony of *Minturn* when he noted in his dissent from the denial of certiorari in *Peralta* that: "*Minturn* improperly excludes from federal maritime jurisdiction disputes that *directly concern the business of maritime commerce.*" 470 U.S. at 1033 (emphasis added).

Minturn has been condemned both because it is irrational and because the principles underlying it were abandoned long ago. Understanding the reasons for rejecting *Minturn* therefore

begin with an examination of the principles that gave rise to the *Minturn* decision.

II.

The Evolution of Admiralty Jurisdiction Prior to Minturn

A) Overview

The decision in *Minturn v. Maynard*, 58 U.S. (17 How.) 477 (1855) is extremely brief and does not adequately reveal the legal basis for the result in that case. That case can, however, be understood from an examination of the legal principles which had evolved up to the time of *Minturn* and which appear to have supported it. The development of these principles is set forth below. A summary of these principles is contained *infra* at 22. As explained in Point IV, all the principles supporting *Minturn* have now been rejected.

B) Origin and Development of English Admiralty Jurisdiction

As originally created and developed, English admiralty jurisdiction was broad in scope. *See generally* S. Friedell, 1 *Benedict on Admiralty* §§ 21-54 (7th ed. 1989) (treatise hereinafter cited as "1 *Benedict*"). Beginning in the late 1500s, however, the common law courts began to restrict the exercise of this jurisdiction by the issuance of writs of prohibition which, in an individual case, barred the admiralty court from proceeding. 1 *Benedict* § 41. These writs "were neither consistent in themselves nor reconcilable with principle." *Id.* Legal commentators have noted that these writs were issued by the common law courts "for more jurisdiction, for gain, [and] not for the public good . . . ." *Id.* As summarized in 1 *Benedict* § 50 at 3-22:

> It is thus clear that the ancient jurisdiction of the English Admiralty was of a most extended and beneficial character, embracing all maritime causes of

> action, but it is equally true, that by prohibitions on most inconsistent and extraordinary grounds, "granted," as Prynne says, "on sudden motions without solemn argument," the exercise of that jurisdiction was from time to time restrained by the King's Bench within very narrow limits.

Justice Story criticized the narrow English writs of prohibition and other restrictions on admiralty jurisdiction in *DeLovio v. Boit*, 7 F. Cas. 418, 421-441 (C.C.D.Mass. 1815) (No. 3, 776). As observed by Justice Story, among the limitations contained in the common law writs were the points "[t]hat where the common law hath jurisdiction it excludes the admiralty, *id.* at 427, and "the admiralty has jurisdiction, only when the parties have bound themselves *in rem.*" *Id.* at 439. Justice Story observed that the decisions of the English common law courts attempted generally to confine admiralty jurisdiction "to things wholly and exclusively done upon the sea. . . . " *Id.* at 431. He further observed that under the writs a contract was considered maritime only if "made upon the high seas" and "to be executed on the high seas. . . . " *Id.*

By the end of the 18th Century, the writs of prohibition had seized from the English admiralty all but the narrowest jurisdiction. 1 *Benedict* § 51. The writs, although effective in preventing the admiralty courts from proceeding in a given case, were incapable of diminishing the inherent jurisdiction of the admiralty courts:

> The Court of King's Bench had power to issue prohibitions, but it had no power to extend or diminish the jurisdiction of the Admiralty. That jurisdiction was conferred by the King's prerogative and royal commission, or by statute, or immemorial usage, and not otherwise, and could be limited only in the same manner.
>
> *Id.* § 50 at 3-23.

There was another restriction on the English admiralty courts: "[w]here suits were brought in admiralty which called for equitable relief, the Chancellor [of the equity court] would enjoin the prosecution of the action." S. Morrison, *The Remedial Powers of the Admiralty*, 43 Yale L. J. 1, 11 (1933). Although few in number, such injunctions "were as effective as the writs of prohibition issued by the common law judges." *Id.* On this basis, for example, a request for an accounting between part owners of a vessel was considered outside the jurisdiction of the English admiralty. *The Appollo*, 166 Eng. Rep. 109 (1824).

Ironically, after 1789, when American courts began to construe their newly granted admiralty jurisdiction, based, in part, on the English writs, English admiralty jurisdiction began to reject the narrow writ approach and to recover its broad scope. 1 *Benedict* §§ 52, 57 & 126 n.28 and the authorities cited therein; S. Morrison, *The Remedial Powers of the Admiralty*, 43 Yale L. J. 1, 12-13 (1933).

C) Origin and Development of American Admiralty Jurisdiction up to Minturn

(1) *Overview*

Article III, Section 2 of the Constitution extended the "judicial power of the United States" to "all cases of admiralty and maritime jurisdiction." By Section 9 of the Judiciary Act of 1789, Congress implemented this grant, providing: ". . . the district courts . . . shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it. . . . "

There was, however, little guidance given to the courts as to the meaning of the grant of admiralty jurisdiction. The early decisions dealing with the subject can perhaps best be described as the courts taking one step forward, defining a new American jurisdiction, and two steps backward, following the

restrictive English writs. Many of these restrictive precedents later resulted in the *Minturn* decision.

(2) *DeLovio v. Boit—Blueprint for a Broad Jurisdiction*

Early American cases initially followed the restrictive English jurisdictional approach from the writs of prohibition. S. Morrison, *The Remedial Powers of the Admiralty*, 43 Yale L. J. 1, 3 (1933). However, *DeLovio v. Boit,* 7 F. Cas. 418 (C.C.D. Mass. 1815) (No. 3776) decided by Justice Story, riding circuit, promised to be the seminal case of an expansive new American admiralty jurisdiction. In *DeLovio*, Justice Story rejected the idea that American admiralty jurisdiction should be constrained by the English view. Instead, Justice Story argued for a jurisdiction that included "all things done upon and relating to the sea, or, in other words, all transactions and proceedings relating to commerce and navigation." *Id.* at 441. Expanding on admiralty jurisdiction, he stated in *DeLovio:*

> At all events, there is no solid reason for construing the terms of the constitution in a narrow and limited sense, or for ingrafting upon them the restrictions of English statutes, or decisions at common law founded on those statutes, which were sometimes dictated by jealousy, and sometimes by misapprehension, which are often contradictory, and rarely supported by any consistent principle. *The advantages resulting to the commerce and navigation of the United States, from a uniformity of rules and decisions in all maritime questions authorize us to believe that national policy, as well as juridical logic, require the clause of the constitution to be so construed, as to embrace all maritime contracts, torts and injuries, or, in other words, to embrace all those causes, which originally and inherently belonged to the admiralty, before any statutable restriction.*

Id. at 443 (emphasis added).

Justice Story then offered the following blueprint for maritime contract jurisdiction, which has yet to be fully realized:

> The next inquiry is, what are properly to be deemed "maritime contracts." Happily in this particular there is little room for controversy. All civilians and jurists agree, that in this appellation are included, among other things, charter parties, affreightments, marine hypothecations, contracts for maritime service in the building, repairing, supplying, and navigating ships; contracts between part owners of ships; contracts and quasi contracts respecting averages, contributions and jettisons; and, what is more material to our present purpose, policies of insurance.

Id. at 444.

As will be seen from the following sections, notwithstanding the broad jurisdictional framework suggested in *DeLovio,* later cases frequently did follow restrictive English precedents, including cases authored by Justice Story himself.

(3) *Vestiges of Restraint on American Admiralty Jurisdiction Relevant to the Minturn Analysis*

In analyzing *Minturn*, it is helpful to understand American court treatment of the following vestiges of restraint on admiralty jurisdiction virtually all of which originate from the English writs.

(a) *The Home Port Rule*

In *The General Smith,* 17 U.S. (4 Wheat.) 438 (1819) (Story, J.), the Court ruled that a supplier of necessaries could not acquire a lien for supplies made in the vessel's home port. In *dicta*, Justice Story suggested that a lien in a vessel's home port could be created under state law and enforced in a federal admiralty court.

(b) *Equitable Accountings*

In *The Steamboat New Orleans v. Phoebus*, 36 U.S. (11 Pet.) 175 (1837) (Story, J.) the Court, among other grounds for its decision, accepted the English rule that "the admiralty has no jurisdiction at all in matters of account between part-owners." *Id.* at 182.

(c) *Rejection of the English "Body of the County"*

Waring v. Clarke, 46 U.S. (5 How.) 441 (1847) dealt with another English limitation: that the admiralty had no jurisdiction over occurrences "within the body of a county." A divided Court abandoned this limitation and held that admiralty jurisdiction existed where a collision occurred "within the body of a county."

(d) *The Concept of Mutual Exclusivity of Admiralty and Common Law Remedies and the Concept that Admiralty Has No Jurisdiction Without a Lien*

In *Ramsay v. Allegre*, 25 U.S. (12 Wheat.) 611 (1827), a concurring opinion embraced two of the restrictions contained in the English writs, stating "[i]f the common law can try the cause, and give full redress, that alone takes away the Admiralty jurisdiction," *id.* at 631, and "[t]hat in case of contracts, it [the admiralty] has no jurisdiction at all *in personam*, except as incident to the exercise of its jurisdiction *in rem*." *Id.* at 640.

Similarly, the dissenting opinion in *Waring v. Clarke*,[2] 46 U.S. (5 How.) 441 (1847), addressing the mutual exclusivity of admiralty and common law remedies, stated:

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[2] *Waring v. Clarke* appears to be one of a number of early cases in which the Court was closely divided on various aspects of admiralty jurisdiction. In that case, for example, three justices dissented, including Justice Grier who would later author *Minturn*. Justice Catron wrote a concurring

(Footnote continued)

> *And our fathers never could have meant*, that parties, for matters happening within a county or State, *should be dragged into admiralty* any more than in equity, *if as full a remedy, and of as good a kind, existed in courts of law, where they could enjoy their favorite mode of trial*. This would leave much to admiralty still, as well as to equity, and more especially in the former, by proceedings *in rem*.

Id. at 472 (emphasis added) (citation omitted).

In *Cutler v. Rae*, 48 U.S. (7 How.) 729 (1849) the Court concluded that there was no *in personam* jurisdiction for a general average claim where the vessel owner had given up its lien on the cargo by delivery. The case seems understandable only on the basis of the then prevailing notion that there could be no jurisdiction in admiralty without a lien.[3] In arriving at the result in that case, the Court stated, in language that would later be reflected in *Minturn:* "[i]ndeed this case seems, in its principles, to be nothing more than the common law action for money had and received, brought in a court of admiralty." *Id.* at 732.

(e) *Limited View of a Maritime Contract*

M'Dermott v. The S.G. Owens, 16 F. Cas. 15, 1 Wall. Jr. 370 (C.C.E.D. Pa. 1949) (No. 8,748) is a revealing circuit court opinion by Justice Grier who, six years later, would write for the Court in *Minturn*. In reversing a decision of the district court, Justice Grier held that a stevedore's claim against

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opinion. According to the dissenting opinion only "four members of this court" participated in the majority opinion. *Id.* at 475.

[3] *See also* Note, *General Agency Agreements and Admiralty Jurisdiction*, 17 Conn. L. Rev. 595, 603 (1985).

a vessel for loading and stowing cargo was outside admiralty jurisdiction. Echoing themes straight from an English writ of prohibition, he wrote: "[t]he services are performed on a contract, which is neither made at sea nor for a service to be performed at sea; both were in the port of Philadelphia, and within the county of Philadelphia. The ship was safely moored at the wharf. . . . " *Id.* at 371.

The Court[4] in *The New Jersey Steam Navigation Co. v. The Merchants' Bank of Boston*, 47 U.S. (6 How.) 344 (1848), stated that a contract, to be maritime, had to involve a service that was "substantially performed upon the sea, or tidewaters." *Id.* at 391. It will be noted that this represents only a slight modification of the English locality test. The dissent (joined by Justice Grier), would have reverted to the restrictive English jurisdictional views, including the view that jurisdiction was "limited in matters of contract (seamen's wages excepted) to things agreed upon and to be performed upon the sea. . . ." *Id.* at 409. Under either the Court's or the dissent's views, admiralty contract jurisdiction was based on locality and, at the very least, the services had to be substantially performed upon the sea.

(f) *Rejection of the "Tidewater" Limitation*

In *The Steamboat Thomas Jefferson*, 23 U.S. (10 Wheat.) 428 (1825) (Story, J.) the Court held that a seaman's claim for wages arising from a voyage on the Missouri River was outside admiralty jurisdiction because of the English "tidewater doctrine," which prohibited admiralty from

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[4] As in *Waring v. Clarke*, the Court in *The New Jersey Steam Navigation* case was sharply divided. Only four justices concurred in the opinion of the Court. Four justices dissented or concurred in opinions which provided different jurisdictional views from those in the opinion of the Court. The ninth justice, Justice M'Kinley, did not take part in the decision.

exercising jurisdiction in waters above the ebb and flow of the tide.

In *The Propeller Genesee Chief*, 53 U.S. (12 How.) 443 (1851), the Court, while noting inconsistency with its prior decisions, rejected the English tidewater limitation, and upheld recent legislation that extended admiralty jurisdiction to the Great Lakes, i.e., above the ebb and flow of the tide.

(g) *General Agents Prior to Minturn*

There appears to be no clear case, prior to *Minturn*, holding that general agency contracts were, *per se*, outside admiralty jurisdiction. However, in accordance with the legal thinking of the time, a contract was not considered maritime unless it was, at least, substantially performed on the sea. Furthermore, general agents were, during this period, frequently part owners of the vessels they served. As stated in C. Perkins, *Abbott on Shipping*, 105-6 (6th Amer. ed. 1850): "[i]t is usual for the several part-owners to appoint a person, frequently one of their own number, to be the manager of their joint concern, their general agent in the use and employment of the vessel, under the name of ship's husband." As already observed, disputes between part owners were considered outside admiralty. *The Steamboat New Orleans v. Phoebus*, 36 U.S. (11 Pet.) 175 (1837).

(h) *Loss of Admiralty Jurisdiction When a Note Secures the Debt*

In *Ramsay v. Allegre*, 25 U.S. (12 Wheat.) 611 (1827), the furnisher of marine necessaries had taken a negotiable promissory note in payment for the necessaries. The Court, in a one sentence opinion, found it had no jurisdiction. It appears from Justice Story's later explanation of *Ramsay* in *The Nestor*, 18 F. Cas. 9 (C.C.D.Me. 1831) that admiralty jurisdiction could not exist in such a case unless the note were first surrendered to the admiralty court. This had apparently not been done in *Ramsay*.

(4) *Summary of Relevant Jurisdictional Principles Prior to Minturn*

At the time that *Minturn* came to the Court for decision in 1855, the following appears to have been the state of various restrictions on American admiralty jurisdiction:

1. The English "body of the county" and "tidewater" restrictions had been rejected in the United States.

2. Many vestiges remained of the English writs of prohibition, however, including the narrow view that a contract had to at least be substantially performed on the sea to be maritime.

3. Certain relief was considered unavailable in admiralty. If, for example, one sought an accounting or other equitable relief, admiralty could not provide it.

4. Members of this Court were still writing dissenting and concurring opinions concerning: (a) whether admiralty jurisdiction and/or common law remedies were mutually exclusive, and (b) whether admiralty required the existence of an *in rem* lien.

5. No federal maritime lien was recognized for necessary services or supplies rendered in a vessel's home port.

6. A dispute between part owners of a vessel was not within admiralty jurisdiction. (At the time, general agents were frequently part owners of the vessels they serviced).

7. A furnisher of marine necessaries might not be allowed to sue in admiralty if he took a note for his services and failed to surrender it to the admiralty court.

III.

Minturn v. Maynard

A) The Facts in Minturn

The Record filed in this Court in *Minturn* shows that in 1850 Charles Minturn was appointed "Agent and Broker" in San Francisco for the steamboat Gold Hunter (*Minturn* Record at 3, 13, 16 & 21). San Francisco was the home port of that vessel. *Id.* at 21. As agent, Minturn paid sums of money for labor, services, materials and supplies to the vessel. He also received and disbursed funds for the vessel owners. He was to receive a 5% commission on all amounts either received or disbursed by him (*Minturn* Appellant's Brief at 1).

The *Minturn* record also shows the defendant made certain jurisdiction-related allegations, including that: Minturn had rendered accountings in the past to the part owners and had isolated the *pro rata* amount that each part owner would owe; all of the part owners paid Minturn and received receipts in discharge of the amounts owed, except for a Mr. Grant; Minturn took a note from Grant for the amount owed; when Grant failed to pay the note at maturity, Minturn sued Grant in state court and attached his interest in the Gold Hunter; and suit was still pending on the note in state court when Minturn started his action in the federal court (*Minturn* Record at 2310[5]).

In the meantime, the Gold Hunter had been arrested, condemned and sold in the federal district court on an unrelated claim. *Id.* at 4, 13 & 17. Sale proceeds were in the registry of the Court. *Id.* Minturn then sued all the part owners in the

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[5] The *Minturn* Record's printed page numbers stop at page 28. The page following page 28 in the *Minturn* Record is handwritten page number 2310.

federal district court and sought an accounting against them for the amount which apparently had been owed by Grant. Attached to Minturn's complaint were seven pages of proposed accountings for settlement by the federal district court of balances allegedly due. *Id.* at 5-11. Minturn also sought *quasi-in-rem* maritime attachment of the funds in the registry. *Id.* at 4.

In briefing the case, the defendants raised virtually all of the limitations on jurisdiction summarized *supra* at 22. *See* Minturn Appellees' Brief at 4-9. Justice Grier, who had endorsed the English limitations on admiralty jurisdiction,[6] was chosen to write the opinion of the Court. (The full opinion of the Court is set out *supra* at 10-11).

B) **Analysis of Minturn**

(1) *Overview*

At least according to the legal thinking of the time, there were sufficient defects in the jurisdictional basis of *Minturn's* suit to convince all of the Justices of the Court to subscribe to Mr. Justice Grier's short and vague opinion. Professor Moore has observed: "some remnant of the restrictive English mentality regarding the admiralty appears to have been present in the minds of the court that decided the early cases." 7A *Moore's Federal Practice* ¶ .250 at 3004-5 & n.10. This appears to be particularly true of the *Minturn* holding.

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6 See, for example, Justice Grier's concurrence with Justice Woodbury's dissent in *Waring v. Clarke*, *supra* at 18-19; Justice Grier's concurrence with Justice Daniel's dissent in *New Jersey Steam Navigation Co.*, *supra* at 20; and Justice Grier's opinion in *M'Dermott*, *supra* at 19-20.

(2) *Home Port/No Admiralty Jurisdiction Without a Lien*

The very first point made by the *Minturn* defendants (the "Appellees" in this court) in their brief was the fact that the services had been supplied in the vessel's home port (Appellees' Brief at 4). Under *The General Smith*, 17 U.S. (4 Wheat.) 438 (1819), this meant that Minturn could not have had a lien on the vessel under the prevailing federal maritime law. Justice Grier then found the possibility of a lien arising under "the local law of California"[7] foreclosed on the grounds that Minturn had "never dealt on the credit, pledge, or security of the vessel," as apparently required.

The jurisdictional consequences of Minturn's lack of a lien were fatal, at least to those Justices who believed that without a lien there could be no admiralty jurisdiction.

(3) *Common Law/Equitable Remedies*

The pre-*Minturn* cases appear to have only barely, if at all,[8] resolved the question of whether admiralty and common law "jurisdiction" were mutually exclusive. In any event, there was apparently strong support for the view, expressed in *Cutler v. Rae*, 48 U.S. (7 How.) 729 (1849) that if a common law "*remedy*" were available, this would foreclose jurisdiction in admiralty. In *Minturn*, Justice Grier, echoing the language in *Cutler v. Rae*, stated that Minturn's "proper remedy" was "an

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7 It was then possible to enforce a state-created lien in the home port in the federal admiralty court. This was overruled shortly after *Minturn*. *See* D. Robertson, *Admiralty and Federalism*, 127-28 (1970).

8 *See, e.g.*, dissent and concurrences in *Waring v. Clarke, 46 U.S. (5 How.) 441 (1847)* and *New Jersey Steam Navigation Co. v. The Merchants' Bank of Boston*, 47 U.S. (6 How.) 344 (1848). While not entirely clear, on the issue of mutual exclusivity of common law and admiralty jurisdiction it appears the Court was divided 4-4.

action of *assumpsit*, in a common law court," thereby implying that such a remedy foreclosed jurisdiction in admiralty.

In the same sentence, Justice Grier stated that "[t]he libel shows nothing but a balance of accounts between agent and principal." As noted above, a request for a court to settle the balance of accounts was considered a form of equitable relief not available in admiralty under cases such as *The Steamboat New Orleans v. Phoebus*, and *The Appollo*, 166 Eng. Rep. 109 (1824). Both of these cases had been cited to the Court by defendants at page 6 of their brief. Under the then prevailing authority, the seven pages of proposed accountings annexed to Minturn's complaint, which had as its object settlement by the district court of the balance of accounts due, rendered the case outside admiralty.

(4) *Not a Maritime Contract*

In their arguments to the Court in *Minturn*, the defendants had cited Justice Grier's opinion in *M'Dermott v. The S.G. Owens*, 16 F. Cas. 15, 1 Wall. Jr. 370 (C.C.E.D. Pa. 1849) (No. 8,748) and another case cited therein. (Appellees' Brief at 5). Both of these cases were based on the premise that a maritime contract existed only if "made at sea for a service to be performed at sea." *The New Jersey Steam Navigation* test of a maritime contract was only slightly more liberal, but it still required that the service be substantially performed on the sea. Since Minturn's actions were performed on land, he could not satisfy the then prevailing test of a maritime contract.[9]

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[9] In fact, six weeks before *Minturn*, in *Bogart v. The John Jay*, 58 U.S. (17 How.) 399, 402 (1855), the Court, without elaborating any particular test of a maritime contract, held that a mortgage on a vessel "has nothing in it analogous to those contracts which are the subjects of admiralty jurisdiction." *See also People's Ferry Co. of Boston v. Beers*, 61 U.S. (20 How.) 393 (1857) holding that a suit on a contract to build a vessel was

(Footnote continued)

Furthermore, Minturn had apparently reduced the amount owed on the underlying debt to a note. Minturn had actually sued on the note in state court and that action was still pending. Under cases such as *Ramsay v. Allegre*, 28 U.S. (12 Wheat.) 611 (1827) the note, at least until surrendered, stood in place of the underlying debt. Since the note would, more obviously, not then be viewed as a maritime contract, it would appear that Minturn had no admiralty jurisdiction for this additional reason.

IV.

Post-Minturn Developments

A) Overview

The English limitations of the "body of the county" and "tidewater" doctrines were rejected prior to *Minturn*. Like these, the restrictive principles which supported the *Minturn* holding were also rejected in later cases.

B) Post-Minturn Developments Concerning No Jurisdiction Without a Lien

The idea that *in personam* maritime jurisdiction could exist only if the claimant was entitled to a lien continued to enjoy support for a time after *Minturn*. Note, *General Agency Agreements and Admiralty Jurisdiction*, 17 Conn. L. Rev. 595, 604 & n.38 (1985). However, in *Insurance Co. v. Dunham*, 78 U.S. 90 (1871), the Court ruled that admiralty jurisdiction does exist in the case of an *in personam* libel on a marine insurance contract despite the fact that no *in rem* lien right exists.

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outside admiralty jurisdiction, stating that "it was a contract made on land, to be performed on land." 61 U.S. (20 How.) at 402.

C) Post-Minturn Husbanding Where Lien Is Relied On

The Kalorama, 77 U.S. 204 (1869) decided two companion cases in which the plaintiffs had each provided services virtually identical to the services provided in *Minturn*. According to the defendants, the plaintiffs had

> . . .assumed entire charge of the steamers for a series of voyages, and were to receive the specified compensation of 10 per cent commission on the gross freights. They became the agents of the owners; freighted the ships, collected the freights, and paid their expenses. These agents appointed captain, officers, and crew, ordered supplies, and stood in the place of owners generally."

Id. at 207 (Statement of counsel for appellees); *see also id.* at 213.

Notwithstanding the apparent similarities between the facts in *The Kalorama* and the facts in *Minturn*, the plaintiffs in *The Kalorama* were found to have maritime liens (and not just admiralty jurisdiction) on account of the advances they had made on behalf of the vessel for marine supplies. The only meaningful difference between the *Minturn* facts and *Kalorama* facts appears to be the finding in *The Kalorama* that there was an "express understanding" that the repairs and supplies in that case were "made and furnished on the credit of the steamer. *Id.* at 214. One of the defendants in *The Kalorama* urged that *Minturn* controlled, and that the plaintiffs'claim was therefore outside admiralty jurisdiction. The Court brushed this aside, distinguishing and questioning *Minturn* with the comment that *Minturn* "does not control the case before the court *even if the rule be admitted to be correct without any qualification*." *Id.* at 217 (emphasis added); *see also The Emily B. Souder*, 84 U.S. (17 Wall.) 666 (1873).

Minturn and *The Kalorama* line of cases appear to be irreconcilable. *Minturn* holds that an agent's claim for advances

is outside admiralty jurisdiction. That holding cannot survive this Court's later decision in *The Kalorama* where, on similar facts, the plaintiffs were held entitled to admiralty jurisdiction and a lien. If *The Kalorama* decision is distinguishable from *Minturn* on some hair-splitting analysis, that distinction should certainly not determine the availability of admiralty jurisdiction today.

D) Post-Minturn Developments Concerning Common Law and Equitable Remedies

The notion that a common law remedy and equitable relief was unavailable in admiralty survived for some time after *Minturn*. In *The Eclipse*, 135 U.S. 599 (1890), discussing equitable relief, this Court stated:

> While the court of admiralty exercises its jurisdiction upon equitable principles, it has not the characteristic powers of a court of equity. It cannot entertain a bill or libel for specific performance, or to correct a mistake, or declare or enforce a trust or an equitable title, or exercise jurisdiction in matters of account merely, Minturn v. Maynard, 17 How. 477, or decree the sale of a ship for an unpaid mortgage, or declare her to be the property of the mortgagees, and direct possession of her to be given to them.

Id. at 876 (all citations but *Minturn* omitted).

Perhaps the first significant indication of a change in the limitation on remedies available in admiralty occurred in this Court's decision in *Krauss Bros. Lumber Co. v. Dimon S.S. Corp.*, 290 U.S. 117 (1933). In that case the plaintiff sued in admiralty to recover an alleged overpayment of freight against the ocean carrier. Jurisdiction was challenged on the grounds that "the payment for excess freight was made under mistake" and hence that "the demand is upon a cause of action for money had and received, which lies only at common law and not in admiralty [i.e. an action in assumpsit]." *Id.* at 124. The

Court brushed these objections aside stating "[a]dmiralty is not concerned with the form of the action, but with its substance." *Id.*

In *Archawski v. Hanioti*, 223 F.2d 406, 407 (2d Cir. 1955), *rev'd*, 350 U.S. 532 (1956), the Second Circuit held a claim for the return of wrongfully withheld passage money to be outside admiralty stating that the claim was "in the nature of the old common law *indebitatus assumpsit*, for money had and received, based upon the wrongful withholding of monies by respondents on the theory that in equity and good conscience, he is under a duty to pay them over to libellants." This Court reversed, stating:

> *We conclude that, so long as the claim asserted arises out of a maritime contract, the admiralty court has jurisdiction over it.*
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> * * *
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> Rights which admiralty recognizes as serving the ends of justice are often indistinguishable from ordinary quasi-contractual rights created to prevent unjust enrichment. How far the concept of quasi-contracts may be applied in admiralty it is unnecessary to decide. *It is sufficient this day to hold that admiralty has jurisdiction, even where the libel reads like indebitatus assumpsit at common law*, provided that the unjust enrichment arose as a result of the breach of a maritime contract. Such is the case here.

Id. at 535-36 (emphasis added).

Hadjipateras v. Pacifica, S.A., 290 F.2d 697 (5th Cir. 1961) involved a managing agency contract. Under the contract in that case, the agent was to "operate the vessel, obtain freight or freight engagements, collect the freight monies and, after deducting all operating expenses, remit the balance to the owners." *Id.* at 700. Plaintiff sued for the balance allegedly due under the contract. Defendants moved to dismiss on the

grounds that the libel "was a suit for an accounting and was therefore beyond admiralty jurisdiction." *Id.* at 700. Judge Brown, who has been called "our leading admiralty authority,"[10] had no trouble finding the agency contract in that case a maritime contract.[11] He then concluded that the court could issue the requested relief, stating:

> If, because the process of adjudication goes a step beyond 2 plus 2, the admiralty loses power, we would have the spectacle of things essentially maritime and thereby automatically within the constitutional supremacy clause [citation omitted] being forced into common law, or equity, courts for determination. Indeed, it would be even more absurd. It would, barring the accident of diversity of citizenship, send essentially federal problems to state courts since there is no jurisdiction on the civil side over a maritime cause of action.

Id. at 704-5.

Swift & Co. Packers v. Compania Colombiana Del Caribe S.A., 339 U.S. 684 (1950) involved the question of whether admiralty had jurisdiction to perform the "equitable" function of looking into an alleged fraudulent transfer of title to a vessel. The Court held that admiralty could provide the requested equitable relief, stating:

> It would be strange indeed thus to hobble a legal system that has been so responsive to the

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[10] *Chevron Oil Co. v. Huson*, 404 U.S. 97, 115 (1971).

[11] Judge Brown wrote: "To begin with, the contract is everything classically known as a maritime contract. It concerns a ship. It relates not only to a ship, its very purpose is to effectuate the physical, economic operation and employment of a vessel." 290 F.2d at 703.

> practicalities of maritime commerce and so inventive in adapting its jurisdiction to the needs of that commerce. . . . We find no restriction upon admiralty by chancery so unrelenting as to bar the grant of any equitable relief even when that relief is subsidiary to issues wholly within admiralty jurisdiction. Certainly there is no ground for believing that this restriction was accepted as a matter of course by the framers of the Constitution so that such sterilization of admiralty jurisdiction can be said to have been presupposed by Article III of the Constitution.

Id. at 691-92 (emphasis added).

Legal developments since *The Eclipse* have brought the availability of equitable relief in admiralty law almost full circle from the examples cited in that case. Admiralty courts now 'specifically enforce' contracts, *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972); correct mistakes, *Krauss Bros. Lumber Co. v. Dimon S.S. Corp.*, 290 U.S. 117 (1933); review allegedly fraudulent transfers of title, *Swift, supra;* exercise jurisdiction in matters of account, *Hadjipateras, supra;* and decree the sale of a ship under a new, statutorily created preferred ship mortgage, *The Thomas Barlum*, 293 U.S. 2142 (1934). *See* S. Morrison, *The Remedial Powers of the Admiralty*, 43 Yale L. J. (1933); *Gilmore & Black* at 40-43. *see also* L. Colby, *Admiralty Unification*, 54 Geo. L.J. 1258, 1268-69 (1966); *but see* D. Robertson, *Admiralty Procedure and Jurisdiction After the 1966 Unification*, 74 Mich. L. Rev. 1625, 1637-45 (1976).

Also, as demonstrated in *Archawski, Krauss Brothers* and *Hadjipateras*, admiralty courts will now take jurisdiction of a suit even though it is similar to a common law action in assumpsit.

E) Post-Minturn Developments Concerning Nature of a "Maritime" Contract

The prevailing test of a maritime contract at the time of *Minturn* was that a contract had to be substantially performed on the sea to be maritime. This "locality" test appears to be a key basis of the *Minturn* decision.

The first significant change in the "locality" test came in *Insurance Co. v. Dunham*, 78 U.S. (11 Wall.) 90 (1871). The contract of insurance involved there was neither made on the sea nor performed on the sea. In *Dunham*, this Court, quoting from *The St. Lawrence*, 66 U.S. (1 Black) 522, 527 (1861), rejected a "locality" approach and stated that the boundary for admiralty and maritime jurisdiction should be "ascertained by a reasonable and just construction of the words in the Constitution, taken in connection with the whole instrument, and the purposes for which admiralty and maritime jurisdiction was granted to the Federal Government." *Id.* at 97. Based on this broad test of jurisdiction, the Court concluded that an insurance contract warranted inclusion within admiralty jurisdiction.

The Court further distanced itself from the "locality" approach in *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961) stating that the "boundaries of admiralty jurisdiction over contracts" are "conceptual rather than spatial." *Id.* at 735. In determining whether a contract is maritime, the Court said that "[t]he only question is whether the transaction relates to ships and vessels, masters and mariners, as the agents of commerce. . . ." *Id.* at 736. Applying a "conceptual" test of jurisdiction, the Court ruled that a post-voyage agreement by a vessel owner to indemnify a seaman for any consequences he might suffer by virtue of being treated at a public health hospital was a maritime contract because it "related to and stood in place of a duty created by and known only in

admiralty [i.e. the duty to pay maintenance and cure] as a kind of fringe benefit to the maritime contract of hire." *Id.*

In addition, cases decided under the Federal Maritime Lien Act[12] ("Lien Act ") have been particularly aggressive in abandoning the "locality" approach in favor of a broad conceptual test. Under such cases, the mere fact of a resulting *benefit to a vessel,* rather than the fact that a service was *performed on the vessel* or *on the sea,* is the key to admiralty jurisdiction and a lien. Furthermore, these cases are quite liberal in determining what constitutes a benefit to a vessel and "[t]he present state of the law is not far from the point where any service which is 'convenient, useful and at times necessary' may qualify as a lien under the Lien Act." *Gilmore & Black* at 658.

Furthermore, cases under the Lien Act have held that an *advance of credit* to purchase marine necessaries is itself a marine "necessary" that gives rise to a lien. *Universal Shipping Inc. v. The Panamanian Flag Barge,* 563 F.2d 483 (lst Cir. 1976); *Crustacean Transportation Corp. v. Atlantic Trading Corp.,* 369 F.2d 656 (5th Cir. 1967).

F) Post-Minturn Summary

The principles supporting *Minturn* have now been thoroughly rejected. Most significantly, a contract no longer has to be performed substantially on the sea in order to be maritime. Admiralty can award relief even though a suit resembles a common law action in assumpsit or calls for equitable relief. Furthermore, it appears from *The Kalorama* that the *Minturn* rule itself should no longer have any force in a case, such as the one at bar where there was "an express understanding" that the services or supplies were "made or

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[12] Now recodified at 46 U.S.C.A. §§ 31305-31307, 31341-31342.

furnished on the credit of the steamer." *The Kalorama,* 77 U.S. at 214. (*See* J.A. 24-25).

V.

The Minturn Rule and Its Progeny Are Irrational, Have Not Led to Predictability, and Cannot Be Justified

A) Irrationality of the Minturn Rule

Irrespective of how the *Minturn* rule evolved and why it is here, the rule that a general agent's claim is outside admiralty is irrational, as noted by the commentators and courts, referred to in Point I, *supra.*

B) Minturn Has Not Led to Predictability

Central Gulf has suggested that *Minturn* has redeeming value because it is simple and predictable.[13] This is erroneous. As pointed out by Justice Blackmun in his dissent from denial of certiorari in *Peralta Shipping Corp. v. Smith & Johnson (Shipping) Corp.,* 470 U.S. 1031 (1985), "[n]ot only is the Minturn rule of dubious validity, but in efforts to narrow its application, the Court of Appeals have developed a number of equally questionable exceptions to the rule that have created confusion and disagreement." *Id.* at 1033-34. As discussed in Exxon's Petition for Writ of Certiorari, there is a sharp conflict in the lower courts both over whether *Minturn* is still viable and over various exceptions and distinctions that have been adopted to avoid its impact. The Court of Appeals for the Second Circuit, for instance, has noted *Minturn's* "erosion in other circuits" based on what it called "hair-splitting distinctions." *Peralta,* 739 F.2d 798 at 803-4. The Ninth Circuit rejected *Minturn* on the grounds that it, and other such

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[13] *See* Central Gulf Opposition to Petition for Certiorari at 5.

cases "[u]nder more modern decisions" are "of doubtful validity." *Hinkins Steamship Agency, Inc. v. Freighter, Inc.*, 498 F.2d 411, 412 (9th Cir. 1974). The Fifth Circuit has found a managing agency contract within admiralty jurisdiction in *Hadjipateras v. Pacifica, S.A.*, 290 F.2d 697 (5th Cir. 1961) despite the lack of any material distinction between the agency contract there and the one in *Minturn*. *Peralta*, 739 F.2d at 804; *Gilmore & Black* at 28 & n.94b.

In attempts to distinguish *Minturn*, a number of courts have added to the confusion by adopting a special agent/general agent distinction and have allowed an agent deemed to be "special" to have both admiralty jurisdiction and a lien, despite *Minturn*. *Ameejee Valleejee and Sons v. M/V Victoria U.*, 661 F.2d 310 (4th Cir. 1981). Ironically, this distinction excludes from admiralty jurisdiction the claim of the agent who provides the greater range of services to maritime commerce. The district court in case at bar refused to adopt this special agent/general agent distinction (Pet. App. A12-A16). This has created a split among the cases in the Second Circuit itself over the existence of the special/general agent distinction, since other courts in the circuit have recognized it.[14] There is, in fact, a second layer of splintering concerning which of several tests should apply to determine "special" agency.

Minturn does not promote simplicity or predictability.

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[14] *Trinidad Corp. v. Sea-Hire Service S.A.*, 1984 A.M.C. 2371, 2373 (E.D.N.Y.), *aff'd.*, 742 F.2d 1441 (2d Cir.), *cert. denied*, 467 U.S. 1242 (1984); *P.T. Perusahean v. T.S. Salzachtal*, 373 F. Supp. 267, 277-78 (E.D.N.Y. 1974).

C) The "Preliminary Contract" Rationale Neither Leads to Predictability Nor Justifies the Minturn Rule

The so-called "preliminary contract" concept is not a rule of this Court, but rather a rule stated in the post-*Minturn*, district court case of *The Thames*, 10 F. 848 (S.D.N.Y. 1881). This theory attempts to exclude from jurisdiction those contracts that are "preliminary" to a maritime activity. It neither promotes predictability nor justifies exclusion of general agency contracts from admiralty.

Although this concept was not specifically mentioned in *Minturn*, some courts have come to rationalize *Minturn* on the basis of it. The district court in the case at bar, for instance, characterized the *Minturn* rule as a "subset of the preliminary contract doctrine" and was "not persuaded that the two principles should be distinct." (Pet. App. A17). Justice Blackmun, in his dissent from the denial of certiorari in *Peralta Shipping Corp. v. Smith & Johnson (Shipping) Corp.*, 470 U.S. 1031 (1985) stated: "this Court, since the time of its single-page opinion in *Minturn v. Maynard*, 17 How. 477, 15 L. Ed. 235 (1855), has refused to extend admiralty jurisdiction to disputes involving general agency contracts that call for 'husbanding' a vessel, that is, arranging for the performance of services that are preliminary to maritime movement." *Id.* The Eleventh Circuit stated in *E.S. Binnings, Inc. v. M/V Saudi Riyadh*, 815 F.2d 660 (11th Cir. 1987): "[t]he reason for excluding such contracts [i.e. contracts such as that in *Minturn]* is the distinction long recognized in admiralty between contracts that involve *preliminary* services leading to maritime contracts and those that are themselves maritime." *Id.* at 633 (emphasis added).

The *Minturn* rule has been criticized when considered as a part of the preliminary contract theory. As noted by Professors Gilmore and Black, the preliminary contract notion "is one of the vague ideas that has to be reckoned with in the twilight zone of jurisdiction." *Gilmore & Black* at 26 n.91. They specifically criticize precedent holding that "some

transactions closely connected with maritime transportation have been excluded, on the ground they were "merely preparatory to such transportation." *Id.* at 31. Other commentators have similarly complained that the preliminary contract idea "has played a role in leading some courts to exclude from the admiralty jurisdiction matters like general agency agreements that are 'intimately related to the shipping industry and would warrant inclusion within admiralty.' " 1 *Benedict* § 183.

One might argue that the preliminary contract theory is simple and easy to apply. This is belied by cases that have allowed, as within admiralty jurisdiction, suits on contracts which arguably could be characterized as preliminary, such as contracts for the lease of ocean shipping containers[15], contracts reserving cargo space on a ship[16], contracts by a port terminal owner to supply a container handling crane to a stevedore[17], contracts for preparing cargo to be shipped[18], and even one case concerning the contract of "an oil bunker broker" to arrange marine fuel oil.[19] *See also id.*

Moreover, simplicity has also never been the litmus test for issues of constitutional dimension. As the Court noted in *Sisson v. Ruby*, ___ U.S. ___, 110 S.Ct. 2892 (1990) "the demand for tidy rules can go too far, and when the demand

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15 1 *Benedict* § 184 n. 21.

16 *Id.* n. 8.

17 *Id.* n. 22.

18 *Id.* nn. 31, 32.

19 *Forsythe International U.K. Ltd. v. M/V Ruth Venture*, 1986 A.M.C. 621, 622 (D.Ore. 1985).

entirely divorces the jurisdictional inquiry from the purposes that support the exercise of jurisdiction it *has* gone too far." (emphasis in original). *Id.* at 2896 n.2.

Furthermore, the cases decided under the preliminary contract notion are based on the outdated English "locality" test. As stated by Professor Moore:

> The courts long ago rejected the "locality" test in determining maritime contract jurisdiction and adopted the "subject matter" test. Nevertheless, in the area of contracts with brokers and agents, courts persist in drawing distinctions quite obviously carried over from the former practice, which placed great emphasis upon the place of performance or execution. *Only by applying a location test could it be convincingly stated that agreements to procure charters, to arrange contracts of maritime affreightment, and to arrange for or oversee the numerous other necessary activities often delegated to brokers and agents are not directly related to maritime commerce. That the contractual obligations of such brokers and agents are entered into and carried out on land and that the maritime tasks are not performed by the brokers themselves should, if Insurance Co. v. Dunham is still valid authority, be of no consequence.* Quite clearly, such agreements are an integral part of, and in furtherance of, maritime commerce and, consequently, should be cognizable within the admiralty jurisdiction of the district courts.
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> 7A *Moore's Federal Practice*
> ¶ .250 at 3004-3006 (emphasis added)

Finally, in the area of fuel supply contracts, where there is often a chain of contracts leading to physical delivery, most courts have not applied the preliminary contract concept, despite the fact that all but one of the contracts in the chain was arguably "preliminary." They have, instead, granted jur-

isdiction and a lien to the supplier who had the contract with the party supplied, irrespective of whether a third party made the physical delivery pursuant to a chain of contracts. In *The Golden Gate*, 52 F.2d 397 (9th Cir.), *cert. denied*, 284 U.S. 682 (1931), for instance, the Ninth Circuit had no trouble finding the libelant-seller entitled to a lien for fuel physically supplied by a third party, stating: "[i]nasmuch as the contract of sale was between the libelant [i.e. like Exxon here, the seller to the charterer] and the charterer, and the supplies were furnished by the libelant pursuant thereto, it is immaterial who made delivery." *Id.* at 400; *See also Gulf Trading & Transport Co. v. Tento*, 694 F.2d 1191, 1192 (9th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983); *Tramp Oil and Marine, Ltd. v. M/V Mermaid*, 805 F.2d 42, 44 (lst Cir. 1986).

Here, Exxon made the delivery to Waterman and Waterman purchased the fuel "pursuant" to the then applicable annual fuel supply contract. As in *The Golden Gate*, it should therefore be "immaterial who made the delivery."

VI.

Admiralty Contract Jurisdiction Under this Court's Modern Decisions

A) Overview

The reasons for overruling *Minturn* and allowing general agency contracts within admiralty jurisdiction are so compelling that no particular rationale for doing so appears to be required. Commentators and this Court have, however, already provided a rationale that leads to both the overruling of *Minturn* and the establishing of a modern framework for maritime contract jurisdiction. Briefly, this rationale requires review of the constitutional purpose of the grant of admiralty jurisdiction and a "conceptual" analysis which considers that purpose and the contract involved.

B) The Purpose of the Constitutional Grant of Admiralty Jurisdiction

(l) *Commentators*

One theme common to the commentators is that the test of admiralty jurisdiction is incomplete unless it is "conceived with the basic purpose for the existence of a separate body of admiralty laws in mind." 7A *Moore's Federal Practice* ¶ .225 at 2711. Professors Gilmore and Black similarly believe "[w]hether a given inclusion within or exclusion from the jurisdiction is warranted must depend on the general sense and policy of having the jurisdiction at all." *Gilmore & Black* at 30-31. They have also suggested that decisions by this Court "could frame a new rationality in the law of admiralty jurisdiction" by including within it those cases in tort and in contract "having *principally to do with maritime commerce.*" *Gilmore & Black* 31 & n.98g (emphasis added). This Court's recent decisions, discussed below, appear to have already formed the tort "half" of the "new rationality." The "other half" of this "new rationality" would be "an equally general affirmative holding drawing into the jurisdiction" all "contracts having principally to do with maritime commerce." *Id.* The Second Circuit, in criticizing Minturn and suggesting that it be overruled by this Court, specifically "agree[d] with the commentators that the jurisdictional boundaries should reflect the concerns underlying the grant of jurisdiction—the federal interest in promoting and protecting the maritime industry—and that 'all those cases involving the enforcement, policing, or adjustment of business arrangements as a practical matter primarily concerned with sea, lake and river transport' should be within the admiralty." *Peralta, supra* 739 F.2d at 804 quoting, C. Black, *Admiralty Jurisdiction: Critique and Suggestions*, 50 Colum. L. Rev. 259, 274 (1950).

(2) *The Early Cases*

One finds clear support in past cases for testing maritime contract jurisdiction against the purpose of the constitutional grant. This can first be seen in *DeLovio v. Boit*, 7 F. Cas. 418

(C.C.D. Mass. 1815) (No. 3,776). In *DeLovio*, Justice Story said that "national policy, as well as juridical logic" require a broad construction of admiralty contract jurisdiction. *Id.* at 443. In both *The St. Lawrence*, 66 U.S. (1 Black) 522, 527 (1861) and *Insurance Co. v. Dunham*, 78 U.S. (11 Wall.) 90, 97 (1871) this Court stated that the test of jurisdiction should be "ascertained by a reasonable and just construction of the words in the Constitution, taken in connection with the whole instrument, and the purposes for which admiralty and maritime jurisdiction was granted to the Federal Government."

(3) *Recent Supreme Court Cases*

This Court's most recent statements concerning the purpose of the Constitutional grant of federal admiralty jurisdiction have been in tort cases. However, the purpose underlying the Constitutional grant of federal admiralty jurisdiction is the same regardless of whether the matter sounds in tort or in contract.

Historically, admiralty tort jurisdiction depended on the locality of the wrong. In *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972), however, the Court rejected "a purely mechanical application of the strict locality test" for admiralty tort jurisdiction. *Id.* at 261. The Court emphasized that "it is far more *consistent with the history and purpose of admiralty jurisdiction* to require also that the wrong bear a significant relationship to traditional maritime activity." Id. at 268 (emphasis added).

Foremost Insurance Co. v. Richardson, 457 U.S. 668 (1982) involved a collision between noncommercial vessels. The Court there acknowledged that "the primary focus of admiralty jurisdiction is unquestionably the protection of maritime commerce. . . ." *Id.* at 674; *see also id.* at 679-680 (Powell, J., dissenting). A majority of the Court, however, rejected the argument that *Executive Jet's* requirement of a "significant relationship with traditional maritime activity" could only arise from a relationship with commercial maritime activity. *Id.* at 674. Instead, the majority found that the

"potential disruptive effect" on maritime commerce arising from the collision justified federal admiralty jurisdiction over the incident. *Id.* at 675. The Court indicated that when a "potential hazard to maritime commerce arises out of activity that bears a substantial relationship to traditional maritime activity . . . admiralty jurisdiction is appropriate." *Id.* at 675 n.5.

Last term, in *Sisson v. Ruby*, __U.S.__, 110 S.Ct. 2892 (1990), the Court applied the *Foremost* analysis to a case involving a fire which began on a yacht docked in a marina. Respondents there argued that the first half of the *Foremost* analysis was not satisfied as the potential disruptive effect on maritime commerce caused by the fire "was minimal because no commercial vessels happened to be docked at the marina when the fire occurred." *Id.* at 2896. The Court rejected such a fact specific jurisdictional inquiry, and explained that the inquiry must focus on the general type of incident involved to determine whether that general type of incident has a potential for disrupting commercial maritime activity. *Id.*

Although *Executive Jet, Foremost* and *Sisson* were tort cases, all clearly state that the fundamental purpose of federal admiralty jurisdiction is the federal interest in protecting and promoting maritime commerce. As quoted by Justice Powell in the dissenting opinion in *Foremost*, " '[t]he only valid criteria of the admiralty jurisdiction is the relation of the matter — whether it be tortious or contractual in nature — to *maritime commerce*.' " 457 U.S. at 680 (quoting 7A *Moore' Federal Practice* ¶ .325[5] at 3006) (emphasis in original).

(4) *Protection and Promotion of Maritime Commerce and the Maritime Lien*

The concept of the maritime lien requires special mention. The existence of a maritime lien has a dual benefit for maritime commerce. First, it protects a vital segment of the business of maritime commerce, i.e., the service sector. Second, it benefits vessels because it promotes the prompt availability of vessel services and supplies. The absence of admiralty jurisdiction

and lien status in the area of fuel supplies puts these benefits at risk. The facts in this case are particularly pertinent to this point. Here, Waterman was experiencing financial difficulties. The local supplier refused to make a supply to the Vessel in a foreign port. Exxon, believing it had a lien under the then applicable fuel supply contract, effected the delivery. Without a lien, future deliveries by fuel suppliers in such situations would be in doubt.

(5) *Uniformity and Constitutional Purpose*

Another important consideration in determining whether to include a particular contract within admiralty jurisdiction is its potential impact on the uniformity of admiralty law throughout the United States. 1 *Benedict* 105. As Justice Blackmun has noted: "uniformity and predictability in the maritime industry were the ends sought in the Constitution. . . ." *Peralta*, 470 U.S. at 1034 (Blackman J. dissenting from denial of certiorari). Whenever considerations important to the shipping industry are involved, admiralty jurisdiction should exist to protect and promote the goal of uniformity.

C) Application of Constitutional Purpose to the Contract

The second part of the jurisdictional analysis under this Court's cases is the consideration of the transaction in question in light of the purpose behind the Constitutional grant. While by no means exhaustive, in a contract setting, this analysis might include the following factors:

- Would interruption of the service have an impact on maritime commerce?

- Is the service in question provided solely or principally to the maritime industry, or is it a generic service provided to many industries?

- Does the service call for some special knowledge of, training for, or adaptation to, maritime commerce or navigation?

- Might there be some need for a uniform, national law concerning some or all of the service?

- Would granting a maritime lien in connection with the service appear proper and helpful to maritime commerce?

Other criteria would no doubt also be relevant to the jurisdictional inquiry. Whatever the criteria, the nature and impact of the particular service should be considered with the Constitutional goal of protecting and promoting maritime commerce in mind.

In fact, courts do a similar jurisdictional analysis now, when a newly considered contract, such as a lease of ocean shipping containers, comes up for consideration.

VII.

This Court's Modern Analysis Applied to the Case at Bar

The result in the case at bar flows from what has been said about post-Minturn developments. The *per se* rule in *Minturn*, and the principles that led to that rule are now anachronistic. Under the unanimous view of courts and commentators, the *Minturn* rule is also irrational and claims under general agency contracts, should be within admiralty jurisdiction. This should be particularly true for the so-called "general agency" contract in the case at bar, under which Exxon not only provided vital vessel supplies through Exxon's local supplier, but Exxon advanced its credit and ultimately paid the local supplier for the supply.

Furthermore, the very purpose of the constitutional grant, the protection and promotion of maritime commerce, is directly

implicated in this case. The local supplier here refused to supply fuel to the Vessel because of Waterman's weak finances. If Exxon had not supplied fuel, as it did, under its so called "agency contract," the Vessel would have eventually come to a physical stop. It would be hard to imagine a clearer interruption to maritime commerce.

As this Court noted in *Detroit Trust Co. v. S.S. Thomas Barlum*, 293 U.S. 21 (1934), "[w]e have had abundant reason to realize that our experience and new conditions give rise to new conceptions of maritime concerns. These may require that former criteria of jurisdiction be abandoned, as, for example, they were abandoned in discarding the doctrine that the admiralty jurisdiction was limited to tidewaters." *Id.* at 52. The *Minturn* rule excluding general agency contracts from admiralty jurisdiction should be discarded or, at least, held inapplicable to Exxon's suit and lien claim respecting the Jeddah Delivery.

VIII.

Request for Relief

Except for application of *Minturn*, Exxon should have an enforceable lien in this case by reason of Exxon, having itself effected the supply, *The Golden Gate*, 52 F.2d 397 (9th Cir.), *cert. denied*, 284 U.S. 682 (1931), having advanced credit, *Universal Shipping, Inc. v. The Panamanian Flag Barge*, 563 F.2d 483 (lst Cir. 1976) and having paid for the supply, *Compagnia Maritima La Empressa, S.A. v. Pickard*, 320 F.2d 829 (5th Cir. 1963) (Brown, J.).

In addition, under this Court's decision in *The Kalorama*, Exxon should be entitled to judgment on its lien claim because there was, in the case at bar, an "express understanding" that the supplies were "made and furnished on the credit of the steamer." 77 U.S. at 214. In particular, Article 6.7(B) of the pertinent annual fuel supply contract provides:

> Deliveries of Marine Fuel hereunder are made not only on the credit of the Buyer but also on the faith and credit of the vessel which uses the Marine Fuel and it is agreed that Seller [i.e. Exxon in the definitional section] and Supplying Company will have and may assert a lien against such vessel for the amount of the delivered price of said Marine Fuel.
>
> (J.A. 24-25)

Moreover, Exxon invoked the Lien Act in its Complaint. This legislation, except for *Minturn*, should apply to the Jeddah Supply. The Lien Act, as then worded[20], stated that "it shall not be necessary to allege or prove that credit was given to the vessel. . . ." 46 U.S.C. § 971. The leading commentators have observed that "the presumption that the lienor relied on the lien has become all but conclusive . . ." *Gilmore & Black* at 668. *Gulf Trading & Transportation Co. v. The Vessel Hoegh Shield*, 658 F.2d 363, 368 (5th Cir. 1981), *cert. denied*, 457 U.S. 1119 (1982) (Brown, J.) ("We agree with the District Court's conclusion that while Gulf obviously relied upon the credit of the charterer Multinational in furnishing bunkers to the Vessel, there is no evidence that Gulf relied *solely* on the personal credit of Multinational or otherwise took any action with the purposeful intention of foregoing its maritime lien on the Vessel") (emphasis in original). *See also Gulf Oil Trading Co. v. M/V Caribe Mar*, 757 F.2d 743, 750 (5th Cir. 1985).

Furthermore, the testimony of Exxon in the case at bar affirmatively showed that Exxon relied on the credit of the vessel and Exxon's lien status. As stated by the Exxon salesman who handled the Waterman account: ". . . yes, if

---

20 At the time the Complaint was filed the Lien Act was contained at 46 U.S.C. §§ 971, *et seq*. Legislative history shows no substantive change was intended by recent amendments to the Lien Act. 1988 U.S. Code Cong. & Ad. News 6104 *et seq*. (*see* particularly 6108).

push comes to shove at the end of the day, Exxon could always go and lien the vessel. . . . So it's something that, sure, it's a given." (J. A. 80-81; *see also* testimony of Exxon's Credit Manager at J.A. 140-143).

Therefore, there is no reason why Exxon should not be entitled to judgment on its lien claim in this case.

In fact, this case proceeded on motions and cross-motions for summary judgment. Both parties provided their claims and defenses on the merits with proof that is contained in the Record. The Jeddah Delivery was argued simultaneously with the New York Delivery. The Jeddah Delivery was, in every material respect other than the physical supplier, identical to the New York Delivery. In the case of the New York Delivery, where *Minturn* was not in issue, the district court awarded summary judgment in favor of Exxon.

Except for the impact of *Minturn*, there is no remaining issue in the case. It is respectfully submitted that the Court should reverse and remand the case with a direction for the district court to enter judgment in favor of Exxon (less credit to be agreed or set by the district court for amounts paid) in connection with Exxon's motion for summary judgment respecting its lien claim for the Jeddah Delivery. 28 U.S.C. § 2106. Remanding the case for any other purpose would lead to a waste of judicial resources. *The First National Bank of Pennsylvania v. The Lincoln National Life Insurance Co.*, 824 F.2d 277, 282 (3d Cir. 1987).

Conclusion

For the foregoing reasons, Petitioner respectfully requests that the judgment below, which held Exxon's suit and lien claim respecting the Jeddah Delivery were outside admiralty jurisdiction, be reversed, and that the district court be directed to enter judgment in favor of Exxon, after giving Central Gulf credit for amounts paid, and for any further and different relief as may be just and equitable.

Respectfully submitted,

ARMAND MAURICE PARÉ, JR.
Counsel of Record

BRADLEY F. GANDRUP, JR.

NOURSE & BOWLES
Counsel for Petitioner
One Exchange Plaza
At 55 Broadway
New York, New York 10006
(212) 952-6200

February 28, 1991

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QUESTIONS PRESENTED

1. Is there a conflict between the District Court's decisions, as affirmed by the Court of Appeals for the Second Circuit, with regard to admiralty jurisdiction over a claim of general agent for shoreside services, and the decisions of the Fifth and Ninth Circuits?

2. Should this Court overrule or limit its opinion in *Minturn v. Maynard*, 58 U.S. (17 How.) 477 (1854), which denied admiralty jurisdiction to an agent, in order to benefit Exxon and would such action by this Court secure any practical gain?

LIST OF PARTIES

In accordance with Rule 29.1 of the Rules of the Supreme Court of the United States, Respondents annexed a list of the corporate parents and subsidiaries as Appendix 1a to its Opposition to a Writ of Certiorari. A revised list has been filed with the Clerk's Office.

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Q. You personally had conversations with Hakim in London?

A. Yes, I did.

Q. Sir, I show you another document and I ask you if you can identify that.

A. This was several days later. Mr. Hakim in London called me to tell me what the status of his payment problems were with Waterman.

Do you want me to go through it line by line?

MR. PARE: First let's please mark it as Exxon Exhibit 10.

(A. telex was so marked as Exxon Exhibit 10 for identification.)

Q. Before we get into that one, though, the previous exhibit, you said you had informed Hakim with respect to the JACKSON?

A. Yes.

Q. Did there come a time you made any decision with respect to the HOOPER, WILLIAM HOOPER?

A. Yes.

Q. That had been projected for delivery on October 25th?

A. Yes. Subsequent to that the salespeople and the treasury people agreed to take the WILLIAM HOOPER also, and we passed that information to Mr. Hakim and also made a nomination.

Q. That was done approximately in the same manner or in a different manner?

A. Same manner.

Q. Done before the delivery took place?

A. Yes.

Q. With respect to Exhibit 10 —

A. Yes.

Q. — could you briefly describe what that represents?

A. Again, that was the phone call from Mr. Hakim in London telling us that Waterman had paid on October 20th, a million fifty-two thousand dollars covering two deliveries, one of which was due on the 5th or was fifteen days late, and the other one due on the 11th of October which was nine days late.

Q. Those were deliveries made directly by AMOCO

[Excerpt of deposition of James E. Sharkey attached as Exhibit 16 to Paré Affidavit filed 5/31/88]

October. And AMOCO came back to Exxon and asked us did we take a direct role in the placement of the Waterman orders.

Q. What do you mean by "direct role"? Did you talk to somebody at AMOCO?

A. No. The conversation was between a gentleman named Hakim and Mr. Matters.

Q. And how did you find out about this?

A. Since I was a salesman, I was made aware that this conversation had taken place.

Q. I'm, sorry. I didn't mean to interrupt you. What was the gist of this conversation?

A. AMOCO wanted to know or actually asked Exxon to revert back to the old procedure where we physically placed the nominations and in effect accepted the credit responsibility for the payment of the oil. And we were somewhat concerned about that turn of events. It would have effectively meant that we would be taking on an added financial burden by assuming this role.

Q. You were going to guarantee the —

A. We would purchase for resale, yes.

Q. Pardon me?

A. We would have to purchase for resale, as we would in the days prior to Waterman going directly to AMOCO.

Q. When did this happen?

A. I can't be specific; but I would say it was in the very early days of October 1983.

Q. Did you make any notes with regard to this?

A. No, not that I'm aware of.

Q. Okay. Did you talk to anyone at Waterman with regard to this?

A. Oh, yes. I spoke with Bill Ryan and — let's see how to phrase it — he was aware, of course, that AMOCO were looking to have the relationship revert back to Esso, Exxon, and I had expressed to Bill that we weren't all that enthused about doing it but that we had an open mind.

Q. Now, did there come a time when a specific vessel was involved, the bunkering of a specific vessel?

A. Yes. Around mid-October, Mr. Hakim of AMOCO basically called Mr. Matters and said that they were reluctant to supply this particular ship, the Waterman vessel, in light —

Q. Do you recall what vessel it was?

A. I think it was the STONEWALL JACKSON.

Q. Had you been involved with the nomination for that ship?

A. Yes.

Q. When had that taken place?

A. Waterman were of the habit of placing their nomination well in advance so that nomination could have been placed with AMOCO at least a month prior to the physical requested loading date, so I can't recall specifically when it was placed but well in advance of the loading date.

Q. And that would have followed the procedure we spoke of before, with the form having been filled out, AMOCO would have been advised by the order and shipping room —

A. Yes.

Q. — and then there would have been a cancellation on your internal —

A. Mariner system.

Q. — Mariner system. Do you have available to you today the form that you filled out with regard to the STONEWALL JACKSON for mid-October 1983?

A. I saw the form yesterday. I don't know if we have it here with us today.

MR. MONTBACH: Counsel?

MR. PARÉ: No, we don't.

Q. Where did you see that form?

A. It was part of the exhibits of Ed Matters and Rudzki.

(Witness confers with counsel.)

Q. You say you thought you saw it yesterday?

A. I thought I saw it, yes. Maybe I just — we kept thousands of these damn things so it's possible that —

MR. MONTBACH: Well, I call for production of that form, if it exists, from counsel, whether or not it was in the boxes of documents. I don't have it. It hasn't been marked in a prior deposition. I would request that it be produced.

Q. With regard to the STONEWALL JACKSON, when the nomination was made, it would have gone into the Mariner

system and then immediately been cancelled from the MARINER system; is that correct?

A. Yes.

Q. Then something occurred, and Mr. Hakim spoke to Mr. Matters and said, around October — is it around October 19th? Does that date sound familiar to you?

A. Prior to the 19th, I think.

Q. Prior to the 19th. What happened then, to your knowledge?

A. That Matters came down to the operational side of the marine sales department and made us aware of the conversation he had with Mr. Hakin and that Hakim, AMOCO, were reluctant to deal on a one-to-one basis with Waterman for future deliveries.

Q. When you say "for future," does that include the STONEWALL JACKSON?

A. Yes.

Q. When you say "reluctant," did they refuse or —

A. I'm not sure whether they flat-out said, "We refuse," but there was a strong overtone that they were not willing to — not willingly willing to go ahead with their arrangement. Almost to the point where, I think, if we didn't accept, they were not going to make the delivery.

Q. Why did Mr. Matters come down to talk to you about it?

A. He had the relationship with Mr. Hakim at AMOCO, but it wasn't Eddie's jurisdiction to make the decision whether in fact we would revert back to the old procedure. He was just

informing us of the fact that AMOCO wished to go back to the old methodology.

Q. Okay. And whose jurisdiction was it to make that decision?

A. At the time, the manager of marine sales was a Mr. Pierce who had replaced Mr. DeWitt. And my immediate boss was a Mr. Sharp, who had replaced Harry Barr.

Q. He was assistant manager?

A. Yes.

Q. This was in October 1983?

A. Yes.

Q. Is Mr. Pierce still employed by Exxon?

A. He is, yes.

Q. And Mr. Sharp?

A. No. He's resigned.

Q. So Mr. Matters advised you of this message from Mr. Hakim?

A. Yes.

Q. And what did you do, if anything?

A. Well, there was a meeting called with the treasurer's group, the rationality being that if we made the decision to take on these deliveries, the responsibilities for these deliveries, we'd have to increase our credit exposure with Waterman, so we have to have permission from the treasurer's group.

Q. Is that Mr. Rudzki?

A. Mr. Rudzki, yes.

Q. Who was at the meeting? Were you there?

A. I don't know if you could refer to it as a specific meeting; but I was involved in a series of meetings, so I don't know if you're talking about a specific, meeting; but there were, you know, every day, there seemed to be some conversation or other regarding Waterman, what do we do about them; so I can't pin it down to a specific site or time period. But I was involved in discussions, ongoing discussions.

Q. With Mr. Pierce and Mr. Sharp?

A. Yes.

Q. And Mr. Rudzki?

A. And Mr. Rudzki; yes.

Q. And did you finally reach a consensus as to what to do?

A. We decided that we would supply on a direct basis.

Q. From then on or for this one vessel?

A. On a one-by-one ship basis, case-by-case.

Q. Okay. Did you talk to anyone at Waterman with regard to this?

A. Yes. I had called Bill Ryan to tell him that we were made aware of the fact that Mr. Hakim at AMOCO did not want to continue the direct relationship with Waterman. Bill acknowledged that such a conversation had in fact taken place, and he was relieved to know that Exxon was willing to buy on his behalf directly from AMOCO and then resell to him.

Q. When did this conversation take place with Mr. Ryan?

A. I'd have to guess somewhere around the middle of October, very close to the loading of the STONEWALL JACKSON.

Q. Did you make any notes with regard to your conversation with Mr. Ryan?

A. No. They were all verbal.

Q. What then happened?

A. I'm not specifically sure; but we reinstated the nominations at Jiddah directly with AMOCO. AMOCO were now aware of the fact that it was Exxon placing the nominations rather than Waterman.

Q. What do you mean by, you "reinstated"

***

agreement, I don't think so. But that's something we can discuss —

MR. PARÉ: Let's take it up at the end. The agreement was that we wouldn't have to duplicate discovery and that's what we're being asked to do now.

MR. MONTBACH: I don't think so. But —

Q. — all right. Now, you stated that the bunkering of the vessel would be on a case-by-case basis at that time; is that right?

A. Yes.

Q. And did there come a time when you then had to consider a second vessel for bunkering at Jiddah?

A. Yes. These — the nominations had already been in the system, you know, presented to us by Waterman at an earlier date, so yes, there was a subsequent loading.

Q. During this time period — well, when was the subsequent loading?

A. I believe it was within two or three days of the STONEWALL JACKSON. It was the —

Q. The WILLIAM HOOPER?

A. The WILLIAM HOOPER, yes.

Q. I'll represent to you that the WILLIAM HOOPER was bunkered on October 26, 1983. I'm sure your counsel will confirm that fact.

MR. PARE: Is that a concession?

MR. MONTBACH: I will concede that there is a bunker delivery receipt marked as Exhibit, Central Gulf number 12-A and 12-B for the WILLIAM HOOPER, October 26, 1983.

MR. PARE: Are you conceding that it was delivered on that date?

MR. MONTBACH: On the assumption that it was, sir.

Q. To your knowledge, were other Waterman vessels bunkered at other ports pursuant to the contract between Exxon and Waterman during this whole time period that we're talking about?

A. Yes.

MR. PARE: I kind of missed the question. If I could just hear it.

(Record read.)

Q. Were those being handled on a case-by-case basis?

A. No.

Q. The amount of the value of the bunkers provided on those vessels obviously impacted on their credit limit; is that correct? Waterman's credit limit.

A. Sure.

Q. But there were no discussions with regard to those vessels?

A. No.

Q. Now, you said that there did come a time when the WILLIAM HOOPER came up for bunkering; is that correct?

A. That's correct.

Q. And what happened, as far as you recall, with regard to that vessel?

A. We had made the commitment to supply the STONEWALL JACKSON and we also committed to supply the WILLIAM HOOPER.

Q. When did you commit to supply the WILLIAM HOOPER?

A. As I say, it was on a case-by-case basis. It had to be days prior to the actual loading. I can't be specific on the date that we approved it.

Q. Was the commitment made to supply the WILLIAM HOOPER made in the same day as the commitment

[Excerpt from the deposition of Adam V. Rudski, attached as Exhibit 17 to Paré Affidavit filed 5/31/88]

A. No, not to my knowledge, no.

Q. Those words are your words?

A. Those are my words.

Q. Now, turn to the next paragraph.

A. Yes.

Q. And you say accepting this proposal would lead to a high level — I am sorry, I will read the whole thing to you: Accepting this proposal (in itself a sign that a third party was losing confidence in Waterman) would have led to a level of exposure which we thought would be unacceptable in the light of Waterman's first half 1983 results; right?

A. Right.

Q. You did not want to entertain the proposal?

A. No. We were not too keen on extending additional credit to a company that was in difficulty.

Q. Understandable. So did you reject that proposal?

A. No. We did not reject the proposal outright, because we did supply maybe — we made two or three deliveries. I don't recall off-hand. I think two in Jedda in the period of October 15 and December 1.

Q. Then you go on to say, however in mid October we were abruptly informed by AMOCO that they would no longer supply Waterman.

A. That's correct.

Q. How did they abruptly — what was the word — inform you?

A. Over the telephone.

Q. Was this the same telephone conversation?

A. There were a number of telephone conversations, I am sure.

Q. Over what period of time?

A. Over a period of two or three days, and naturally a request from Arabian Marine or a statement from Arabian Marine that they will no longer supply was a dilemma for us to decide whether we will let the vessel be stranded in Jedda or whether we make the delivery. That required discussion with senior management.

Q. Now, who spoke in these telephone conversation on behalf of Arabian maritime?

A. Who is the individual?

Q. Yes.

A. Mr. Matters.

Q. Spell that please.

A. M a t t e r s .

Q. Where is he based?

A. He is in Floral Park, New Jersey.

Q. That's on your side, Exxon?

A. Yes.

Q. Who spoke on behalf of Arabian Maritime?

A. I believe Mr. Hakim.

Q. Have you spoken to Mr. Matters about these conversations?

A. Yes, Mr. Matters was the one that advised me and the commercial department that Arabian Marine will no longer supply Waterman.

Q. Did Mr. Matters keep notes of his conversations?

A. I don't know. That's what I said I don't know and I will be very happy to find out for you.

Q. Next sentence, you were concerned that Exxon's refusal to supply Waterman with only a days notice would signal such a series problem to other suppliers and creditors that it might precipitate a financial crisis?

A. Right.

Q. You were going to stand behind Waterman in Jedda?

A. We did not want to let the ship be stranded, because there was no supplier.

Q. So we therefore decided to make the imminent deliveries in Jedda and to continue to supply Waterman on a case by case basis.

Do you have any memorandum or notes reflecting that decision?

A. Only one, I believe that was prepared by Mr. Sharkey that we have already entered into this, that we have reviewed it with Waterman and agreed to take some deliveries.

MR. O'BRIEN: I don't remember seeing that.

A. I may be confusing this.

MR. PARÉ: The witness is referring to Central Gulf Exhibit 6.

Q. Is Sharkey in there?

A. That was written by Jim Sharkey and documents the various visits with Waterman and the things that we were deciding or not deciding to do. But —

Q. I don't think that's the answer to my question. I can't remember my question, but I don't think that's the answer to it.

A. I think you asked — God, maybe we should start again.

(Testimony read)

Q. Now, in the last section of that memo, outlook, you again referred to the 780 thousand dollars on a delivery of a ship which Waterman chartered from Central Gulf Lines?

A. Right.

Q. That's in accordance with prior draft memorandum?

A. That's correct.

Q. When you decided to make these standby or the one

Unites States Bankruptcy Court
Southern District of New York

In re:	:	
Waterman Steamship Corporation,	:	In proceedings for reorganization under Chapter 11 Case No. 83 B 11732 (HCB)
Debtor,	:	

City of Jeddah)
) SS:
Country of Saudi Arabia)

Camille A. Hakim, being du.y sworn, deposes and says:

1. I am the Manager of Arabian Marine Operating Company ("Arabian Marine"), a Company engaged in the delivery of bunkers to vessels.

2. By arrangement with Exxon International Company, a Division of Exxon Corporation ("Exxon") Arabian Marine delivers bunkers to Exxon's customers' vessels calling at Jeddah, Saudi Arabia when requested to do so by Exxon. In October, 1983 Arabian Marine was requested by Exxon to do so for the William Hooper ("The Vessel"), delivery was made on October 26, 1983 of 4,242.47 Metric Tons of bunkers by Arabian Marine in the Port of Jeddah.

3. I have been told there is an issue as to whether any Arabian Marine Personnel involved with this delivery were aware of the existence of a Charter Party with respect to the Vessel and/or a purported provision in such Charter Party prohibiting Liens arising against the vessel in connection with

the furnishing of bunkers or other supplies or services to the vessel. I have reviewed this matter with the Master, Mr. Yoo Gwang Duk, the Chief Officer, Mr. Kim Hae Song and the 1st Engineer, Mr. Yuk Jang Soo all of the M/T "HABIBA" and Master, Mr. Yun Kil Nam, the Chief Officer, Mr. Yoo Myung Tek and the Foreman, Mr. Chu Dae Se of the M/T "ZEINA", the two barges which delivered the bunkers to the Vessel and find that none of them was aware either of the existence of a Charter Party or a Charter party provision as just described. In addition, they informed me that none of the other members of the crews were aware of any such Charter Party or Charter Party provision and that the other members of the barges crews had no contact with the crew of the Vessel.

4. I have been informed that it is claimed that a Charter Party and/or a "No Lien" notice was posted on the bridge of the Vessel. The six men identified above have informed me that the bunkers in question were supplied by bunker barges, that the bunker barges pulled alongside the Vessel, the Vessel's crew lifted the barges' bunker delivery hoses aboard the Vessel and thereafter attached the hoses to the Vessel's bunker fuel manifold. No one from the bunker barges went onboard the Vessel before, during or after this operation nor was it necessary for them to do so.

5. To the best of my knowledge, no other personnel of Arabian Marine ever had any notice or knowledge of any Charter Party or any Charter Party provision as described above.

6. To the best of my knowledge, the foregoing is also tru with respect to any other Vessels bunkered by Arabian Marine on Exxon's behalf for the account of Waterman Steamship Corporation.

Respectfully submitted,

/s/ Camille A. Hakim

Camille A. Hakim

Manager,
Arabian Marine Operating Co.

Sworn to before me this
2nd Day of June, 1984.

Kingdom of Saudi Arabia :
Western Province : ss.
City of Jidda :
Embassy of the United States of America

Before me, Louis P. Russell Consul of the United States of America at Jidda, Saudi Arabia, duly commissioned and qualified, personally appeared Camille A. Hakim Who subscribed and sworn to the above before me this 2nd day of June 1984.

/s/ Louis P. Russell
LOUIS P. RUSSELL
CONSUL OF THE UNITED STATES OF AMERICA

SEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EXXON CORPORATION,	
Plaintiff,	: 86 Civ. 9445 (WCC)
-against-	
CENTRAL GULF LINES, INC. *in personam* and the M/V GREEN HARBOUR (ex WILLIAM HOOPER) *in rem*, her engines, boilers, tackle, etc. and a certain letter of Credit No. P 621208 dated December 26, 1984 issued by the Chase Manhattan Bank, N.A., *in rem.*,	: AFFIDAVIT : OF ADAM : RUDZKI : IN SUPPORT OF : MOTION FOR : SUMMARY : JUDGMENT
Defendants.	

STATE OF NEW JERSEY)
) ss.:
COUNTY OF MORRIS)

ADAM V. RUDZKI, being duly sworn, deposes and states:

1. I am the Credit Manager of Exxon Company, International, an unincorporated division of Exxon Corporation (hereinafter "Exxon"). I formally acted as Chairman of the Creditors' Committee in the Chapter XI Petition of Waterman Steamship Corporation (hereinafter "Waterman").

2. Attached as Exhibit "1" are copies of the Exxon checks, transfer instructions and debits to Exxon's account, evidencing payment by Exxon to Arabian Marine Operating Co. Ltd., via its Tokyo bank, for fuel delivered to the STONEWALL

JACKSON and WILLIAM HOOPER at Jeddah, Saudi Arabia on or about October 19 and October 26, 1983, in the amounts of $541,653.39 and $749,229.20 for deliveries to the STONEWALL JACKSON and WILLIAM HOOPER, respectively. (The delivery to the WILLIAM HOOPER at Jeddah is hereinafter referred to as the "Jeddah Delivery"; no claim is being asserted herein with respect to the STONEWALL JACKSON delivery).

3. Up to and including December 1, 1983 when Waterman filed its Chapter XI Petition, Waterman had not paid for the Jeddah Delivery. In addition, up to and including this time, Waterman had not paid for a marine gas oil delivery made to that Vessel at New York on or about October 7, 1983 in the amount of $13,241.63 (hereinafter the "New York Delivery").

4. Prior to Exxon's experience with Waterman in or about October, 1983, Waterman had an excellent payment history with Exxon and had regularly paid its bills for bunkers within the established credit periods.

5. Following the Waterman reorganization, Exxon received $86,321.39 in cash on account of the New York and Jeddah Deliveries. In addition, Exxon received 20,267 shares of Series "A" Waterman stock and 27,023 shares of Series "B" Waterman stock on account of the New York and Jeddah Deliveries. Dividends on these shares have amounted to $40,534.00 and $23,239.78 respectively.

/s/ Adam V. Rudzki

Sworn to before me this
11th day of May, 1988

/s/Beverly C. Koehler
Notary Public

[Notary Stamp]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EXXON CORPORATION,	
Plaintiff,	86 Civ. 9445 (WCC)
-against-	
CENTRAL GULF LINES, INC. *in personam* and the M/V GREEN HARBOUR (ex WILLIAM HOOPER) *in rem*, her engines, boilers, tackle, etc. and a certain letter of Credit No. P 621208 dated December 26, 1984 issued by the Chase Manhattan Bank, N.A., *in rem.*,	AFFIDAVIT OF JAMES E. SHARKEY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT
Defendants.	

STATE OF NEW JERSEY)
) ss.:
COUNTY OF MORRIS)

JAMES E. SHARKEY being duly sworn, deposes and states:

1. I am a marine salesman for Exxon Company, International (formally known as Exxon International Company), an unincorporated division of Exxon Corporation (hereinafter "Exxon"). I was the account representative who handled the sale by Exxon to Waterman Steamship Corporation (hereinafter "Waterman") of the marine gas oil and bunker fuel oil referred to herein.

2. Waterman has been one of Exxon's accounts for over 40 years. So far as I am aware, Exxon has been the sole source

of worldwide bunker supplies to Waterman over this period, with the limited exception of the short time at Jeddah, Saudi Arabia, referred to herein. Attached as Exhibits "1" - "3" are the Waterman/Exxon contracts for the sale of bunker fuel oil covering 1981, 1982 and 1983, respectively. Exhibit "3" is the Waterman/Exxon contract for the sale of bunker fuel oil in issue (sometimes hereinafter referred to as the "Exxon/Waterman Fuel Oil Contract"). The main terms of these contracts are, however, the product of negotiation each year between Exxon and Waterman. I was involved in the negotiation of the 1983 contract (Exhibit "3"). The prices and volumes contained in Exhibit "3" were those agreed to with Waterman. This contract was prepared by me and mailed to Waterman. Fuel deliveries made by Exxon to Waterman during 1983 were made and billed in accordance with this contract.

3. When Waterman was in need of bunker fuel oil or marine gas oil, someone at Waterman's office in New York would telephone usually either myself or Fred Ehrhardt at Exxon in New York (now New Jersey) and place an order giving the expected amount, location in the world, and approximate date of the supply. This information would be recorded by one of us at Exxon on a form and then given to the shipping room. Thereafter, the shipping room would send a telex nomination to the Exxon supplier at the particular location in question to effect physical delivery of the supply. Following the supply, Exxon would invoice Waterman (and also the vessel) and Waterman would, in due course, pay Exxon in accordance with the Exxon/Waterman contract. Exxon has various non-affiliated suppliers throughout the world to meet Exxon's supply commitments to Exxon's customers. These suppliers would invoice Exxon and Exxon would pay the invoice price to such supplier. Exxon would then invoice its customer and the vessel supplied.

4. At Jeddah, for instance, Exxon had a written contract for supplies to be physically delivered by Arabian Marine Operating Co., Ltd. (hereinafter "Arabian Marine"). A copy of the Exxon/Arabian Marine contract in effect at the time of the fuel oil supply is attached as Exhibit "4".

5. On or about January 1, 1982, however, Waterman, in order to take advantage of certain discounts which Exxon was unable to grant to Waterman at Jeddah, discontinued using Exxon at Jeddah (with Exxon's consent) and began purchasing fuel directly from Arabian Marine under terms and conditions of which Exxon had no knowledge. Nominations, however, were still, made by Waterman in New York telephoning Exxon in New York. Exxon, in turn, sent these nominations to Arabian Marine. Exxon was not involved in invoicing or billing between Waterman and Arabian Marine for such supplies and Exxon performed these services as an accommondation to Waterman and without compensation (see generally Exhibit "5").

6. On or about August 25, 1983 Waterman, in New York called Exxon, in New York, and requested that 17,000 barrels of bunker fuel oil be supplied by Arabian Marine to the vessel STONEWALL JACKSON at Jeddah on or about October 16, 1983. A copy of the Exxon request form is attached as Exhibit "6".

7. On or about September 29, 1983 Waterman, in New York, called Exxon, in New York, and requested that 28,000 barrels of bunker fuel oil be supplied by Arabian Marine to the vessel WILLIAM HOOPER at Jeddah on or about October 25, 1983. A copy of the Exxon request form is attached as Exhibit "7".

8. Exxon passed on the supply requests discussed in paragraphs 6 and 7 to Arabian Marine as an accommodation to Waterman in accordance with the procedure outlined in paragraph 5.

9. In or about mid October, 1983, Arabian Marine became concerned about Waterman's ability to pay Arabian Marine for bunker fuel oil being delivered directly by Arabian Marine to Waterman at Jeddah in accordance with the direct arrangements Arabian Marine and Waterman had made. There were various discussions between Exxon and Arabian Marine about this and also between myself and Waterman. As a result of these

discussions, Exxon agreed with Waterman that it would, on a case by case basis, once again supply bunker fuel oil to Waterman at Jeddah under the then current Exxon/Waterman Fuel Oil Contract referred to in paragraph 2 (see generally Exhibits "10" and "11").

10. This agreement for Exxon to once again make deliveries to Waterman at Jeddah under the subject Exxon/Waterman contract was concluded on or about October 19, 1983 at which point the supply to the STONEWALL JACKSON previously ordered from Arabian Marine by Waterman and referred to in paragraph 6 was imminent (see generally Exhibits "10" and "11"). I notified Waterman that Exxon agreed to supply the vessel and Exxon ordered Arabian Marine to make the physical supply on Exxon's behalf in accordance with the existing Exxon/Arabian Marine contract. Fuel was supplied to the STONEWALL JACKSON in accordance with the newly revised arrangement on October 19, 1983. Arabian Marine invoiced Exxon for the supply and Exxon, in turn invoiced Waterman and the Vessel. A copy of the Arabian Marine telex invoice to Exxon for fuel delivered to the STONEWALL JACKSON is attached as Exhibit "12". As can be seen from this invoice, Exxon's payment to Arabian Marine was to be made in Tokyo. This was due to the fact that Arabian Marine was partly owned by Mitsui O.S.K. Lines, Ltd., a Japanese company. A copy of Exxon's invoice to Waterman and the Vessel is attached as Exhibit "13". Exxon paid Arabian Marine for this delivery but Waterman failed to pay Exxon up to and including the time that Waterman filed its Chapter XI Petition on December 1, 1983.

11. Similarly, on or prior to October 26, 1983, Exxon agreed with Waterman to make the supply of bunker fuel oil to the WILLIAM HOOPER previously ordered from Arabian Marine by Waterman and referred to in paragraph 7. Exxon, in turn, ordered Arabian Marine to make this delivery. The delivery was made on or about October 26, 1983. Copies of the delivery receipts are attached as Exhibit "14". Exxon invoiced Waterman (and the vessel) for this delivery. A copy of the invoice is attached as Exhibit "15". Exxon had, in turn, been

invoiced by telex and by mail by Arabian Marine, who had agreed to effect the physical supply at Exxon's request. A copy of these Arabian Marine invoices are attached as Exhibit "16". As with the STONEWALL JACKSON delivery, Exxon made payment to Arabian marine's bank in Tokyo. Waterman, however, failed to pay Exxon for this fuel supplied at Jeddah up to and including the time of the filing of Waterman's Chapter XI Petition on December 1, 1983.

12. There is another supply not at Jeddah for which claim is also made. On or about October 6, 1983 Waterman, in New York, called Exxon, in New York, and requested that 5,300 gallons of marine gas oil be supplied to the vessel WILLIAM HOOPER on October 7, 1983 in New York. A copy of the request form filled out by Exxon is attached as Exhibit "8". In accordance with this request, Exxon delivered the gas oil in question and subsequently invoiced Waterman (and the vessel) for this. The invoice is attached hereto as Exhibit "9" in the amount of $13,241.63. This amount was not paid by Waterman prior to filing its Chapter XI Petition on December 1, 1983.

/s/ James E. Sharkey

Sworn to before me this
25 day of May, 1988.

/s/Jane K. Hobson
Notary Public

[Notary Stamp]

MEMORANDUM

January 25, 1982

TO: Mr. J. W. Holmes

FROM: E. J. Matters Waterman Steamship Corp.

The subject customer approached us in December 1981 advising us that competition has been offering substantial discounts at Jeddah. As company policy will not permit us to participate in this practice in Saudi Arabia we suggested that Waterman make their own arrangements for price and supplies.

Waterman, as a result of our recommendation, and being extremely well satisfied with the service their vessels were receiving at Jeddah, elected to negotiate directly with Arabian Marine Operating Company. While we were not aware of the terms of such agreement, Waterman has requested, and we have agreed, to continue to accept and transmit their nomination as a service to them.

Arabian Marine has similarly agreed and though they offered to reimburse us for the expense involved, we chose not to accept any renumeration, preferring to minimize any financial involvements since the billing would similarly not involve EIC.

The arrangements are retroactive to January 1, 1982.

/s/ EJM

EJM:cms

cc: D. E. Speers
F. H. Ehrhardt

Memorandum Order Blank 407-006C

THINK

[Illegible]: EX/NJ Nom ID Status:
Customer: Waterman S/S Customer Acct No: 77100
Vessel: S/S William Hooper Flag: Am
Cust Order #: VOY13 Port:Jeddah
Delivery Date/Range: Oct 25

Bunkers: Quantity: 28000 Unit: BL
Product: BFO Method: TBA

Agent: [Illegible] Salesperson: [Illegible]
Taken By: [Initials] 9/29 Time: 1630
Placed By: [Illegible] Supplier: 212-747-8984

TELEPHONE NO. (201) 765-5721
DO NOT SEND PAYMENT TO ABOVE ADDRESS

S/S WILLIAM HOOPER & OWNERS

WATERMAN STEAMSHIP CORPORATION
708 RICHARDS BLDG.
NEW ORLEANS, LA. 70112

YOUR ACCT # 100119592

Invoice Number Please Show on Remittance: 105057

Payment due: 11/15/83 Invoice Date: 18OCT83

Original Delivery Location and Date: New York 07OCT83
[Illegible] Ref.: 11H10 Supplier: 125

Description: Gas Oil Quantity: 41.929T
Price: 277.250/T Net Value: 11,624.

Description: Truck Charge Quantity: 4.000T
Price: 300.00/T Net Value: 1,200.

Description: 3.25Pct Gross Recpts Tax
Net Value: 416

Total: U.S.: 13,241

This invoice is based on the receivable, transferred to Exxon International Company, Which Arose from Signed Delivery Receipt No. XXXX

Unless Payment Instructions are Indicated above
Please Refer to Reverse Side

FILE COPY

[Handwritten notes]

Aug 21, 1984

Waterman/Jeddah

Stonewall Jackson — Oct 19
17 KB — ~ 465 K$

William Hooper — Oct 25

28 KB — ~ 765 K$

Cash 30 day
ex U.S.G.
10 - 1 — Int.
5 - 2 — 10%

3 ship behind in payment.
3.5
30 day

Please tell Ryan we have accepted S. Jackson

He was speaking today w/ HAKIM so he (Ryan) could be concerned!

I told Hakim we would take Jackson with no commitment about others.

October 19, 1983

MEMO

TO: P.P.Pierce/J.E. Sharkey

FROM: R.M.Sharp

1. There was a preliminary meeting with Rudzki and Dupont (Treasurers) with Sharp and Sharkey re Waterman. Next week there is a more formal meeting with Treasurers to develop a joint Treasurers/Commercial position. Sharkey will brief Bill Ryan of Waterman re our immediate concerns and the fact that we are still studying the Jeddah situation.

2. Treasurers ok'd Waterman to load 500,000 Bbls. at Jeddah and they are ready to be loaded now.

3. Treasurers is weighing how to contact Manufacturers Hanover Trust to obtain additional financial insight into Waterman.

   Sharkey to cover Items 1-3 in briefing to Pete.

4. Tentative meeting with Nigerian Fuel on Friday, 10/21, 12:30 pm.

*STONEWALL JACKSON 10/19/83

Nom. 17,000 bbls [INITIALS]

THE FOLLOWING UNFORMATTED MESSAGE WAS RECEIVED FROM [ILLEGIBLE].

8954007MOI [ILLEGIBLE]
2009 83-11-[ILLEGIBLE] 11:39

[Handwritten notation: "Chris — Note the 'Allowance' — This is EIC's commission. There is no discount applicable to Waterman! EJM 11/19]

TELEX FROM ARABIAN MARINE BUNKER SALES CO. LTD.
TO MESSRS EXXON INTERNATIONAL CO. LTD.
ATTN: MR. LD MATTERS OR MR. RUDZKI
DATED: 21ST OCTOBER 1983

RE: BUNKER SUPPLIED TO 'STONEWALL JACKSON' AT JEDDAH ON 19TH OCT 1983

INVOICE NO.: 7/J 3414/1153

QUANTITY	DESCRIPTION	UNIT PRICE USD	AMOUNT USD
3,067.12	BUNKER FUEL OIL	189.00	552,081.60
[Hand-written notation: "EIC Commission"]	LESS ALLOWANCE	3.40	10,428.21
			541,653.39

(U.S. DOLLARS FIVE HUNDRED FORTY-ONE THOUSAND SIX HUNDRED FIFTY THREE AND CENTS THIRTY NINE ONLY)

TOTAL USD 541,653.39
ARABIAN MARINE BUNKER SALES CO., LTD.
DULY SIGNED BY A. YAMAJI

KINDLY EFFECT PAYMENT AS AGREED TO THE BANK OF TOKYO LTD., TOKYO OFFICE, A/C NO. 9057400 FOR ACCOUNT OF ARABIAN MARINE BUNKER SALES CO., LTD.

OFFICIAL INVOICE WILL BE AIRMAILED TO YOU WITH SUPPORTING VOUCHERS IN DUE COURSE.

REGARDS
UNQT

EXXON INTERNATIONAL COMPANY
A DIVISION OF EXXON CORPORATION
CONTROLLER'S DEPARTMENT
200 PARK AVENUE
FLORHAM PARK, NJ 07932

UNLESS PAYMENT INSTRUCTIONS ARE INDICATED BELOW, PLEASE REFER TO REVERSE SIDE

TELEPHONE NO. (201) 765-5721
DO NOT SEND PAYMENT TO ABOVE ADDRESS

S/S/ WILLIAM HOOPER & OWNERS

WATERMAN STEAMSHIP CORPORATION
708 RICHARDS BLDG.
NEW ORLEANS, LA. 70112

YOUR ACCT # 100119592

Invoice Number Please Show on Remittance: 115019

Payment due: 11/30/83 Invoice Date: 08NOV83

Original Delivery Location and Date: Jeddah 26OCT83
[Illegible] Ref.: 11H03
Supplier: 999 Order No.:VOY13
Description: Bunker C
Quantity: 4,242.470T
Price: 180.000/T
Net Value: 763,644.60

This invoice is based on the receivable, transferred to Exxon International Company, Which Arose from Signed Delivery Receipt No. XXX

U.S.$ 763,644.60

ARABIAN MARINE BUNKER SALES CO. LTD.
Hamilton, Bermuda
General Sales Agent for
ARABIAN MARINE OPERATING CO., LTD.
Jeddah, Saudi Arabia

INVOICE No. T/J 3425/11569
Date: 31st, October 1983

To Messrs. Exxon International Co., Ltd.
Bunker supplied to "WILLIAM HOOPER" at Jeddah on 26th October, 1983

Quantity: 4,242.47 MTS
Descriptions: Bunker Fuel Oil
Unit Price U.S.$: 180.00 Amount U.S.$: 763,644.60

Descriptions: Less allowance
Unit Price U.S.$: 3.40 Amount U.S.$: 14,424,.40

(U.S. Dollars Seven Hundred Forty Nine Thousand Two Hundred Twenty and Cents Twenty Only)

E. & O.E.

Total: U.S.$ 749,220.20

Please remit the above amount to The Bank of Tokyo Ltd., Tokyo Office, A/C No.0857483 for account of Arabian Marine Bunker Sales Co., Ltd.

ARABIAN MARINE BUNKER SALES CO., LTD.

/s/

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EXXON CORPORATION, Plaintiff, -against- CENTRAL GULF LINES, INC. *in personam* and the M/V GREEN HARBOUR (ex WILLIAM HOOPER) *in rem*, her engines, boilers, tackle, etc. and a certain letter of Credit No. P 621208 dated December 26, 1984 issued by the Chase Manhattan Bank, N.A., *in rem.*, Defendants.	AFFIDAVIT OF FRANCIS A. MONTBACH IN SUPPORT OF DEFENDANTS MOTION FOR SUMMARY JUDGMENT 86 Civ. 9445 (WCC)

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

FRANCIS A. MONTBACH, being duly sworn, deposes and says:

1. I am a member of the firm of BIGHAM ENGLAR JONES & HOUSTON, attorneys for defendant Central Gulf Lines, Inc., et. al. and having handled this matter since its inception an fully familiar with all the facts and proceedings heretofore had herein.

2. This affidavit if submitted in support of defendant Central Gulf Lines, Inc., et. al. (hereinafter "Central Gulf") motion for summary judgment pursuant to Federal Rules of

Civil Procedure Rule 56(b) denying plaintiff Exxon Corporation's (hereinafter "Exxon") claim of a lien against and the M/V GREEN HARBOUR (ex WILLIAM HOOPER) *In rem.*

3. Central Gulf Lines, Inc. is a corporation organized and existing under and by virtue of the laws of the state of Delaware with an office and place of business at One Whitehall Street, New York, New York. At all material times, Central Gulf was the owner of the vessel now known as the GREEN HARBOUR (ex WILLIAM HOOPER), a vessel documented under the laws of the United States and at all material times flying the United States Flag. (hereinafter referred to as "the vessel" or "WILLIAM HOOPER").

4. On October 11, 1979, Waterman Steamship corporation (hereinafter "Waterman") as charterers and Central Gulf as owners entered into a twelve (12) year bareboat charter party agreement granting Waterman the right to hire the WILLIAM HOOPER, the terms of this charter party being identical as those contained in the attached charter party of the "GREEN VALLEY". (Defendant's Exhibit A). It was agreed that Waterman employ the vessel for common carriage of goods by sea in its American flag fleet between ports in the United States and various ports in the Middle East and/or Far East. The charter party contained a "no lien" clause prohibiting the Charterer from imposing a lien on the vessel. (Defendant's Exhibit A, Clause 23.) Furthermore, Clause 30 provides that the charter party was to be construed and governed in accordance with the admiralty and maritime laws of the State of New York.

5. Based upon documents produced, Exxon claims to have been arranging supplies of gas oil and bunker fuel oil for Waterman for the years 1972 through 1974 and 1981, under a so called "Essomarine Lubricants Contract" and an "Exxon Marine Fuel Contract".[1] (Defendant's Exhibit B). Prior to January, 1982, approximately the time when oil prices started to drop, the individual bunker supplies were arranged by Exxon by means of a telephone nomination from Waterman to Exxon,

[1] No such fuel contract has been produced for the years 1982 or 1983.

who in turn would contact a domestic or foreign supplier in the particular port of loading (Defendant's Exhibit C). As such, Exxon itself did not act as a supplier within the meaning of the Ship Mortgage Act 46 U.S.C. Section 971, et seq.[2] Instead, they arranged for the suppiy of vessels by local fuel companies in the particular port of loading under a specific agreements, with each local supplier.

6. On or about October 7, 1983 Exxon was requested to arrange the supply of 41,929 tons of fuel gas oil to the WILLIAM HOOPER at New York. (Defendant's Exhibit T) It is claimed that these bunkers were delivered to the vessel by a supplier. As a result, Exxon invoiced Waterman for this fuel on or about December 1, 1983, in the amount of $11,624.82. However, no proof hs been given establishing actual delivery to the vessel.

7. When Exxon arranged for the supplying of bunkers to vessels at the port of Jeddah, Saudi Arabia, it did so in furtherance of a contract between itself and Arabian Marine Operating Company (hereinafter "Arabian Marine"). Under this bunkering agreement, dated May 1, 1977, Arabian Marine retained Exxon to procure customers for Arabian Marine to be supplied with bunkers in Jeddah. (Defendant's Exhibits E and F). In order to comply with the terms of this agreement Exxon was to solicit customers for the sale of marine fuels to be supplied by Arabian Marine at Jeddah, for which services Exxon received a commission. (Defendant's Exhibits E, G and I). Exxon arranged for Waterman to obtain any bunkers it needed at Jeddah from Arabian Marine. The latter would supply the bunkers to a specific vessel, invoice Exxon, Exxon would pay Arabian Marine and then Exxon would invoice Waterman (Defendant's Exhibit C). The service rendered by Exxon consisted simply of bringing together a willing buyer and a willing supplier of fuel

[2] "Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owners, . . ."

oil, in the attempt to conclude a contract. The Ship Mortgage Act 46 U.S.C. Section 971 extends the protection of a maritime lien to "a person... furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries to any vessel...", however, it is well established law that a brokerage contract is not a maritime contract and does not give rise to a maritime lien. Thus the maritime lien for brokerage services asserted by Exxon is completely without legal support or precedent.

8. In early 1982, local Jeddah bunker suppliers, reacting to the recession in the world oil market, started discounting their prices (Defendant's Exhibits J and K). Waterman, becoming aware of this discounting, requested that Exxon arrange for similar price reductions, however, Exxon felt that their company's policy would not permit them to act in violation of a direct order by the Saudi Government not to sell fuels below government set prices. Exxon recommended to Waterman that it negotiate directly with Arabian Marine (Defendant's Exhibit K at page 37). As described in a memorandum dated January 15, 1982, written by Mr. Edward J. Matters, the Senior Marketing Executive of Exxon, Exxon, as of that date, chose to no longer be actively involved with the soliciting of customers for bunkering by Arabian Marine at Jeddah (Defendant's Exhibits K and L). Since Exxon, by the end of January, 1982, was no longer involved in soliciting or arranging such bunkering arrangements, they did not receive any renumeration, in the form of commissions, or otherwise, as in the past. (Defendant's Exhibit 8).

Exxon's only involvement with Waterman's bunkering orders for Jeddah, after January 25, 1982, was tangentially through the providing of communication services for Waterman to place its own orders directly as a service to customer in good standing. Exxon allowed Waterman to transmit their orders to the supplier, Arabian Marine, through Exxon's Mariner telex system. Exxon would transmit the order for Waterman and then cancel it internally, so that Arabian Marine knew that Exxon was only transmitting a Waterman order.

(Defendant's Exhibits J; K at page 40; H at page 9-10). As stated by Exxon's Mr. James Sharkey:

"This was the methodology of informing AMOCO that Waterman wanted to bunker a ship *but we were not in the title change*. It was more or less a passing of information." (emphasis added). Defendant's Exhibit K at 37.

In fact, Exxon did not know at what price Waterman was buying fuel oil from Arabian Marine. (Defendant's Exhibit K at page 39). Thus, after January 25, 1982, Exxon was no longer acting as a broker for Arabian Marine for supplies to Waterman's chartered vessels in Jeddah.

9. By October, 1983, Waterman's financial position had deteriorated and some invoices for bunkers supplied in Jeddah by Arabian Marine to Waterman were delayed in payment by Waterman. (Defendant's Exhibit H at p. 10).

10. Sometime in mid-October 1983, Arabian Marine's Mr. Hakim contacted Mr. Edward J. Matters of Exxon, requesting that Exxon take back Waterman as a customer and to revert to the old procedure where Exxon would physically place the nomination and accept the credit responsibility for the payment of the supplies. (Defendant's Exhibits M, N, O, P and Q). The STONEWALL JACKSON and WILLIAM HOOPER had been nominated to load at Jeddah on or about October 19, and 26, 1983, respectively. After January 1982, when Waterman was acting directly with Arabian Marine, Waterman had the habit of ordering bunkers one month before the scheduled loading date. (Defendant's Exhibit P at 77 and Exh. S). With regard to the October 26 lifting, Exxon had no involvement with the placement of Waterman's order for bunkering of the WILLIAM HOOPER at Jeddah, which order had been placed on September 29, 1983, at least three weeks before Exxon was asked by Arabian Marine to guarantee payment of this delivery (Defendant's Exhibits R and S). Thus, the October 26 lifting was one of those orders made by Waterman merely using Exxon's telex facilities. It is evident, therefore, that Exxon cannot rely upon the Maritime Lien Act 46 U.S.C. section 971

since this section clearly states that it applies only to one who has supplied the vessel "...upon the order of the owner of such vessel, or of a person authorized by the owner...". Clearly, the Federal Maritime Lien Act does not protect Exxon in a situation where they neither ordered nor supplied the vessel.

Shortly after the delivery was made, a confirmation telex, dated October 27, 1983, was sent to Arabian Marine directly to Waterman (Defendant's Exhibit V).

11. The fact that Exxon was acting "only as a guarantor" is emphasized by the fact that subsequent to the delivery an invoice was sent to Exxon for the delivery of bunkers to the WILLIAM HOOPER (Defendant's Exhibit G). This invoice reflects the commission payable to Exxon, which can only affirm that Arabian Marine wished to treat Exxon as its broker again. On or about November 16, 1983, the "Jeddah bunkering agreement" was reinstated and amended, retroactively to October 19, 1983, the date of a prior bunkering of the STONEWALL JACKSON in Jeddah by Arabian Marine, giving back to Exxon its status as broker for Arabian Marine (Defendant's Exhibit X). This agreement, however, was not executed until December 21, 1983, one month after Waterman had filed for reorganization under Chapter 11 of the United States Bankruptcy Code (Defendant's Exhibit Y).

12. Exxon is now attempting to position itself within the protection of the Ship Mortgage Act by asserting that it acted as the "supplier" of the fuel oil to the WILLIAM HOOPER and relied on the credit of the vessel in so doing. This argument is without merit. As discussed above, Exxon has admitted that it did not act as a supplier of fuel oil. At best, it was acting as a broker in accordance with the Arabian Marine–Exxon contract which specifically describes Exxon's services as those of a broker.

Even if, for argument's sake, one would characterize Exxon as being a supplier, in this transaction, the Ship Mortgage Act would be of no avail to Exxon, since Exxon did not rely on the credit of the vessel. Reliance on the credit of a

vessel as required under 46 U.S.C. Section 971 is a rebuttable presumption to be determined by objective standards. James E. Sharkey of the Exxon Marine Sales Department who was directly involved in this claim, testified that he was not aware of the fact that the WILLIAM HOOPER was owned by Central Gulf Lines (Defendant's Exhibit D) and that to his knowledge Exxon had *never* relied on the credit of a vessel or arrested a vessel if a bunkering bill went unpaid (Defendant's Exhibit D). In order to avoid an interruption of Waterman operations due to Arabian Marine's stated unwillingness to continue to supply Waterman vessels, Exxon extended an additional 1.5 million to 2.5 million on its existing 6 million credit line to Waterman (Defendant's Exhibits W and BB). In fact, when Exxon had committed itself to guarantee payment of the STONEWALL JACKSON and the WILLIAM HOOPER to Arabian Marine, they opened discussions with Waterman with regard to securing their credit exposure with a Letter of Credit or some other form of security provided for *by Waterman.* (Exhibits Z and BB). Under such circumstances, one would be hard pressed to believe that Exxon ever looked to the credit of the vessel and would break its long time habit of abjuring from arresting a vessel for non-payment. In fact, Waterman was never required to put up security since Exxon relied on its long term business relationship with Waterman and believed them to have an:

> ". . . excellent banking relation with Manufacturers Hanover and they (the bank) are going to see us (Waterman) through this crisis." (emphasis added). (Defendant's Exhibit AA).

In fact, Waterman failed to make arrangements for meeting with a high level contact at Manufacturers Hanover Bank to satisfy Exxon's requests for security. (Defendant's Exhibit BB) Thus, Exxon solely looked upon Waterman to fulfill the obligations incurred by them as guarantor.

14. On December 1, 1983, Waterman filed for Chapter 11 Reorganization with the United States Bankruptcy Court and Exxon filed a proof of claim in this proceeding (Defendant's Exhibits Y & and CC). Exxon to date has received at least

$86,321.39 in cash out of the reorganization plan for Waterman confirmed on June 19, 1986 and a total of $63,772.82 in stock dividends. Now Exxon is claiming the remaining, non-reimbursed amount against Central Gulf *in personam* and the WILLIAM HOOPER *in rem*.

15. As set forth in above factual statement, the facts do not support Exxon's claim for the existance of a maritime lien under the Ship Mortgage Act 46 U.S.C. Section 971 et seq. where Exxon did not act as supplier and even if Exxon would have supplied the necessaries to the vessel, this was not done on the credit of the vessel.

Whereas there is no genuine issue as to any material fact as set forth in this affidavit, defendant Central Gulf Lines if of the opinion that they are entitled, as a matter of law, to a judgment in their favor dismissing plaintiffs' claim. We therefore respectfully request this Court to grant defendants motion for summary judgment, dismissing plaintiffs' action.

/s/ Francis A. Montbach

Sworn to before me this
22nd day of June, 1988

/s/ Vincent T. Hoban, Jr.
Notary Public

[Notary Stamp]

[Excerpt of deposition of James E. Sharkey attached as Exhibit D to Montbach Affidavit filed 6/23/88]

Q. Now, with regard to the WILLIAM HOOPER, were you aware at the time this transpired as to who the actual owner of the WILLIAM HOOPER was?

A. I just assumed it was Waterman's ship. It was a Waterman's ship, as far as I was concerned.

Q. You had no knowledge as to who the true owner was?

A. No, I did not.

Q. Did you have any knowledge as to whether or not the vessel was under charter for Waterman?

A. I really never gave it any thought. I just knew the HOOPER was part of the Waterman fleet. Whether it was — I didn't give any thought as to its equity ownership or whatever.

Q. How did you know it was part of the Waterman fleet?

A. As part of our file, we have a listing of the ships that are controlled by various accounts.

Q. Are you referring to a specific document?

A. It's possible, here again, possible that the name of the ship might have been attached to the lube contract that we had for the Waterman fleet. Oftentimes it's just a fly sheet included in the customer's file folder, desk file folder.

* * *

A. No, our relationship was exclusively with Waterman. We at this point in time had not asked for any letters of credit. Is that what you —

Q. Well, I'm — whatever form —

A. No. —

Q. — whatever form of payment from anyone else.

A. No, our relationship, our contract was exclusively with Waterman. There was no letter of credit in place at this point in time.

MR. PARE: I'm not sure the witness clearly understands your question, which — I know what you're getting at, but —

A. Would you — I'll be happy to answer it, maybe, if you want to rephrase it.

Q. What I'm asking is, were you looking to the credit of Central Gulf Lines with regard to any of the vessels' —

A. No. —

Q. — outstanding amount supposedly owed you by Waterman?

MR. PARE: Are you talking about Central Gulf itself or the vessels?

MR. MONTBACH: Well, let's go one at a time.

A. No, I would have no reason to even think Central Gulf should be involved.

Q. What about the vessels themselves, the individual vessels that were being bunkered? Were you relying on the credit of those vessels?

A. Our sale is always, as it is in our contract, it says that the sale is to the vessel and, yes, if push came to shove at the end of the day, Exxon could always go and lien the vessel, if

that were — that's a situation in which Exxon would take with absolute care.

It's something that we don't do willingly. So it's something that, sure, it's a given. You could do this at the end of the day. But it's something that we would very reluctantly approach.

Q. Was that something that you were more reluctant to approach with Waterman vessels than —

A. Any vessels. Exxon has a — I think, if you look back through our records, ECI, the corporation I work for, I can't personally recall any vessel ever being arrested. We go to great pains to explore every avenue before we revert to that issue.

Q. Are you aware of them ever having done that?

A. ECI? The corporation I work for? No. I don't know of any instance where my corporation, a customer of mine, had a ship arrested. They came close —

Q. Pardon me?

A. We have come close, we've threatened lawsuits, but we have not yet, to my knowledge, arrested a ship. Now, the corporation, other affiliates, I'm sure, were involved in ship arrests, but I wouldn't be aware of them.

Q. I think just a few more questions, sir.

Now, sir, prior to the middle of October 1983, you said there had been conversations, ongoing conversations with regard to the viability, if you will, of Waterman and you had been part of these conversations; is that correct?

A. Yes.

Q. Had you ever received any memoranda setting forth what the Waterman fleet was and who owned the various vessels in the Waterman fleet?

A. There were memos that were issued by the treasurer's department that gave a historical outline

JEDDAH BUNKERING AGREEMENT

This Agreement between the Arabian Marine Operating Company (hereinafter called Arabian Marine) and Exxon International Company (hereinafter called Exxon) covers the solicitation of bunker customers by Exxon and the sale and delivery of marine fuels as bunkers by Arabian Marine to such customers at the port of Jeddah, Saudi Arabia.

SERVICES

Exxon shall solicit and arrange for the sale of marine fuels to international customers having bunkering requirements at the port of Jeddah. Arabian Marine shall supply marine fuel to those customers nominated by Exxon.

PRODUCTS

The marine fuels to be delivered under the procedures established in this Agreement shall be commercial grades of Bunker Fuels Oil and/or Marine Diesel Oil and/or Light Marine Diesel and/or Marine Gas Oil offered by Arabian Marine at the time of delivery. Arabian Marine shall bear no responsibility for the selection and acceptance of the marine fuel for use in the vessels to which such marine fuel is delivered, but will be responsible to insure that marine fuel of the grade and specification nominated is delivered.

PRICING

The product price to be invoiced to Exxon for marine fuels delivered under this Agreement shall be Arabian Marine's product selling price in U.S. dollars in effect at the time of delivery for the grade of marine fuel delivered. Arabian Marine will immediately advise Exxon by cable or telex of any change in their product selling price. Arabian Marine's normal barging charge will be shown separately on each invoice.

PAYMENT

Payment for each marine fuel delivery is to be made by Exxon to Arabian Marine in U.S. Dollars within 30 days after the date of delivery or 10 days from receipt of the invoice and supporting documents, whichever is later. In return for services performed by Exxon, Arabian Marine will pay Exxon a commission equal to one and three quarters percent (1-3/4%) of the invoiced product price. This commission shall be deducted from the invoice issued by Arabian Marine and from Exxon's payment to Arabian Marine. An additional volume commission will be paid to Exxon by Arabian Marine at the end of each six month consecutive period commencing from the effective date of this agreement. Such volume commission will apply to the total volume delivered within the period and will be paid within 15 days following the end of the period. The volume commission rate will vary according to the total volume delivered within each six-month period as follows:

Total Volume		Rate for Total Volume
Over 12,000 metric tons	-	$0.50 per metric ton
Over 18,000 metric tons	-	$0.75 per metric ton
Over 24,000 metric tons	-	$1.00 per metric ton
Over 30,000 metric tons	-	$1.25 per metric ton

All payments due Arabian Marine under this agreement shall be made in U.S. Dollars via telegraphic transfer to National Commercial Bank, Jeddah for account Arabian Marine Operating Company, account No. 37444.

All payments due Exxon under this agreement shall be made in U.S. Dollars via telegraphic transfer to Bankers Trust Company, 16 Wall Street, New York, New York for account Exxon International Company, Account No. 038-1-089606.

NOMINATIONS

Exxon or its representative will nominate directly to Arabian Marine those ships that the latter is to supply under this

Agreement, and will provide details of the quantity and quality of the products required. This will be done by telex or by cable, at least 48 hours in advance of the date on which the delivery has been requested. Deliveries by Arabian Marine under this Agreement shall be made only pursuant to previously received instructions.

DELIVERIES

Arabian Marine will expeditiously supply the ships nominated by Exxon or its representative at any hour of the day or night on working days or holidays, without applying any extra charge, subject to port regulations and/or government orders.

In the event that more than one vessel requires bunkering at the same time, the order of arrival will be in principle respected. Arabian Marine will not be liable for demurrage or for any loss due to congestion at the loading terminal of Jeddah refinery or to prior commitments of available delivery equipment. Arabian Marine will only be liable for demurrage or detention when the said demurrage or detention is imputable to the negligence of its own personnel or its agents.

Notice of a claim arising under this Agreement shall be given in writing to Arabian Marine within ninety days from date of delivery.

TITLE

Title to all fuel delivered by Arabian Marine to the nominated customers solicited by Exxon will pass directly from Arabian Marine to the customer at the flange of the receiving vessel.

RECEIPT

Arabian Marine will obtain a receipt for each delivery on the certificate of delivery by signature of the Captain, Chief Engineer or authorized representative of the vessel to which the marine fuel is delivered and will send by air mail the original

and two copies of each delivery receipt to Exxon attached to the appropriate invoice.

Subsequent to each delivery Arabian Marine will cable details of such delivery to Exxon or its designated affiliate specifying the data as shown in Attachment I.

MEASUREMENTS AND SAMPLES

Arabian Marine shall extend an express invitation to the Chief Engineer or his delegate of each ship supplied so that he may be present at the measuring operations carried out at the beginning and end of the delivery and may also observe the way in which the fuel samples are taken during the said supply operation.

The quantity of marine fuel delivered shall be determined from the official gauge, meter, or tank ullage of the barge, tank or pier effecting delivery. Adjustment in volume owing to difference in temperature shall be made in accordance with ASTM-API-IP Petroleum Measurement Table 54. In the measurement of marine fuel, Arabian Marine shall make a deduction for all water and non-petroleum sediment in excess of one per cent (1%) and shall not invoice for this excess. If the Captain, Chief Engineer or authorized representative of the vessel for which marine fuel has been requested is not present or represented, the Arabian Marine determination of quantities shall be deemed to be correct. Arabian Marine will permit the Buyer to inspect the oil delivered before it is pumped to the vessel.

Representative samples from each grade of fuel delivered shall be taken, complying in all respects with Attachment II.

At the end of each delivery, Arabian Marine shall deliver to the Captain, Chief Engineer or authorized representative a sealed sample of the product delivered, retaining another identical sample in the installation at Exxon's disposal for a minimum period of 90 days.

The delivery of sample on board will be reflected in the receipts signed by the authorized representative of the vessel. The delivered volumes and quality shown on the receipts signed on board, will be considered as the only valid data for all the purposes of the present agreement.

LIABILITY

Under no circumstances will Arabian Marine be held liable if unable to make delivery because of causes not reasonably within Arabian Marine's control and for which Exxon or its affiliates are excused by Force Majeure provisions in their customer contracts. Such causes include, but are not limited to, labour disputes, strikes, government interventions, wars, civil commotions, fire, flood, accident, storm, or any act of God.

ASSIGNMENT

This agreement may be assigned in whole or in part by either party to any affiliate or subsidiary upon written notice to the other party, but to a third party only with the express consent of the other party.

TERM

This agreement shall commence on May 1, 1977 and shall continue until terminated at the end of any calendar year by either party upon not less than three months' prior written notice to the other.

ACCEPTED & AGREED TO ON BEHALF OF	ACCEPTED & AGREED TO ON BEHALF OF
ARABIAN MARINE OPERATING COMPANY	EXXON INTERNATIONAL COMPANY
By: /s/_____	By: /s/_____

ATTACHMENT I

INTERNATIONAL MARINE SALES — DELIVERY
COMMUNICATION & INVOICING SYSTEM

Delivery Data Cable

The following format will be used for the cable transmission to EIC N.Y. (cable address shown below) of bunker delivery data related to all Jeddah deliveries.

EXXONINCON
New York
Attention: AVMARSEC

A	DATE OF DELIVERY (Always write: month, day & year in this order)
B	DELIVERY INVOICE NUMBER
C	NAME OF VESSEL
D	NAME OF CUSTOMER
E	JEDDAH, S.A.
F	MODE OF TRANSPORTATION (barge, pipeline, etc.)
G	PRODUCT GRADE/UNIT PRICE (Bunker Fuel Oil, Marine Diesel Oil)
H	GROSS BARRELS
K	LOADING TEMPERATURE
L	A.P.I. GRAVITY
M	NET BARRELS
O	HASH TOTAL (G + H + K + L + M)
P	METRIC TONS (2 DECIMALS)
Q	OTHER CHARGES (explain: taxes, extra hoses, etc.)
	SENDER (ARABIAN MARINE — JEDDAH — cable address)
	COPY OF DELIVERY DATA CABLE ATTACHED.

Explanatory Notes:

For more than one products, separate information required by a slant line, e.c.,

G	-	BFO/68.00 MDO/98.00
H	-	500.23/100.11
K	-	95/85
L	-	18.1/27.1
M	-	490.1/97.5
O	-	62000/21142

Number the cables consecutively in an appropriate series.

ATTACHMENT II

FUEL SAMPLES AND QUANTITY CONTROLS

Arabian Marine will:

- Invite the Captain, Chief Engineer or authorized representative to witness the quantity measurements made at both the start and finish of the delivery.

- Invite the Captain, Chief Engineer or authorized representative to witness the method by which representative samples of the delivery are drawn.

- Provide the Chief Engineer with a sample representative of each product delivered.

- Retain at the delivery port for at least 90 days a second sample representative of the product delivered.

Communications with Chief Engineers

Before bulk delivery begins, the Captain, Chief Engineer or authorized representative will be advised of the procedure and invited to inspect and witness the quantity-determination procedure and the drawing of samples.

Obtaining Representative Samples:

- Samples should be drawn on all deliveries of marine fuels.

- Only clean and empty sample collectors should be used. All normal precautions should be taken to avoid contamination (by rain or dirt, for example).

- The most representative sample is a drip (continuous) sample taken throughout the delivery. If this is not practical, a composite sample will consist of equal portions taken at the start, midpoint, and end of the delivery.

- The size of the sample drawn should amount to at least one liter (or quart).

- Sampling location on pipeline will be as near the ship as possible.

Preparation of Ship's and Retained Samples

The representative sample drawn during the delivery will be well mixed before taking off the two 1/2 liter (1/2 quart) samples. The containers used for these two samples will be made of tin or plastic. After filling, the containers will be labelled with the following information:

- Name of vessel

- Supplier

- Date of delivery

- Delivery port

- Product grade

- Name of barge, tank or pier facility.

PRESENTATION OF SAMPLE

One of the sealed samples will be given to the ship's Chief Engineer. The other should be retained by Arabian Marine for at least 90 days. The fact that a sample is given to the Chief Engineer will be indicated on the delivery ticket.

EXXON INTERNATIONAL COMPANY

1251 Avenue of the Americas
New York, N.Y. 10020

April 27, 1977

Mr. N. Takamiya
Arabian Marine Operating Co.
c/o Mitsui-OSK
3-3, Akasaka 5-chome,
Minato-ku, Tokyo, Japan

Jeddah Bunkering Agreement

Dear Sir:

This will confirm our mutual understanding regarding two points in the payment clause of the subject agreement.

(1) Prior to December 31, 1977 Exxon and Arabian Marine will review invoicing and payment performance, particularly the interval from date of delivery to receipt of the invoice and documents by Exxon, to determine whether the 10 day period from receipt of invoice to payment should be modified.

(2) Concerning the volume commission to be paid by Arabian Marine to Exxon, the initial period for computation and payment will be extended from six to eight months i.e., May 1, 1977 through December 31, 1977, which thus changes the volume criteria as follows:

Total Volume	Rate for Total Volume
Over 16,000 metric tons	$0.50 per metric ton
Over 24,000 metric tons	$0.75 per metric ton
Over 32,000 metric tons	$1.00 per metric ton
Over 40,000 metric tons	$1.25 per metric ton

Commencing with deliveries January 1, 1978 the computation and payment of the volume commission will be governed by the terms of the basic agreement.

If you concur with this understanding, kindly countersign and return one copy of this letter.

Very truly yours,

Agreed

/s/ _____ /s/ _____

N. Takamiya F. J. Iarossi

Arabian Marine Operating Co. Ltd.

EXXON INTERNATIONAL COMPANY

1251 Avenue of the Americas, New York, NY 10020

Marine Sales Department
J S BATES Vice President and Manager

April 25, 1978

Addendum to Jeddah Bunkering Agreement

Mr. N. Takamiya
Arabian Marine Operating
c/o Mitsui-Osk
3-3, Akasaka 5-chome
Minato-Ku, Tokyo, Japan

Dear Sir:

With reference to "Jeddah Bunkering Agreement" which commenced May 1, 1977, it is hereby mutually agreed between Arabian Marine Operating Company (Arabian Marine) and Exxon International Company (Exxon) that the first sentence of the clause "PAYMENT" is amended to read:

"Payment for each marine fuel delivered is to be made by Exxon to Arabian Marine once a month not later than the 15th day of the month for such deliveries made in the previous month, and Exxon will provide cable advice to Arabian Marine containing the telegraphic transfer number and the name of the bank through which payment was arranged."

An additional sentence which become the second sentence of the "PAYMENT" clause reads as follows:

"Invoices received later than seven days following month of delivery will be paid by Exxon to Arabian Marine ten days after receipt of invoices, and supporting documents."

It is further agreed that this change in payment terms will become effective with deliveries commencing April 1, 1978.

Please indicate your agreement by affixing your signature in the space provided and return to us for our records.

Very truly yours,

/s/ J. S. Bates

J.S. Bates

ACCEPTING AND AGREED TO
ON BEHALF OF
ARABIAN MARINE
OPERATING COMPANY

By: /s/ N. Takamiya

Arabian Marine Operating Co. Ltd.

Exxon Ex. 2 for ID
Aug. 21, 1984

ARABIAN MARINE OPERATING CO LTD
JEDDAH - SAUDI ARABIA
H.R.H. Prince Abdallah Al-Faisal Al-Saud, Chairman

12th February, 1981

Mr. E.J. Matters
EXXON International Company
1251 Avenue of the Americas
New York, NY 10020

Dear Sir,

Addendum to Jeddah Bunkering Agreement

Reference is made to our telex communication regarding amendment of "JEDDAH BUNKERING AGREEMENT". We are pleased to enclose herewith original and duplicate of relative addendum duly endorsed by us.

As we explained by telex, for the reason of our internal accountancy convenience, a new company named Arabian Marine Bunker Sales Co., Ltd. was established and we entrust this company with the collection of bunker value and settlement of commission with your company.

Enclosed addendum is prepared to incorporate the new company's function into present agreement. And also, taking this opportunity, we have incorporated all amendments made by previous addenda dated April 25, 1978 and May 2, 1978 respectively.

We shall be much obliged if you will kindly examine the contents and if you find them agreeable please return the duplicate to us with your signature.

Yours faithfully,

Arabian Marine Operating Co. Ltd.

N. Takamiya
Managing Director

Exxon Ex4 for ID
Aug 21, 1984

ADDENDUM
TO
JEDDAH BUNKERING AGREEMENT

With reference to "Jeddah Bunkering Agreement" commenced May 1, 1977, it is this day mutually agreed between Arabian Marine Operating Company (hereinafter called Arabian Marine) and Exxon International Company (hereinafter called Exxon) that the Clause "PAYMENT" is amended as follows:-

(A) Payment for each marine fuel delivery is to be made by Exxon to Arabian Marine Bunker Sales Co., Ltd. (hereinafter called AMBS) once a month not later than the 15th day of the month for such deliveries made in the previous month, and Exxon will provide cable advice to AMBS containing the telegraphic transfer number and the name of the bank through which payment was arranged. Invoices received later than seven days following month of delivery will be paid by Exxon to AMBS ten days after receipt of invoices and supporting documents.

(B) In return for services performed by Exxon, Arabian Marine will pay Exxon a normal commission equal to one and three quarters percent (1-3/4%) of invoiced product price.

An additional volume commission will be paid to Exxon by Arabian Marine at the end of each six month consecutive period commencing from the effective date of this agreement.

Such volume commission will apply to the total volume delivered within the period and will be paid within 15 days following the end of the period.

The volume commission rate will vary accordingly to the total volume delivered within each six month period as follows:

Total Volume	Rate for Total Volume
over 12,000 metric tons	$0.50 per metric ton
over 18,000 metric tons	$0.75 per metric ton
over 24,000 metric tons	$1.00 per metric ton
over 30,000 metric tons	$1.25 per metric ton

Settlement of both normal and additional volume commission shall be made through AMBS.

Normal commission shall be deducted from the invoice issued by AMBS from Exxon's payment to AMBS.

Additional volume commission shall be deducted from Exxon's payment to AMBS after mutual conformation of the amount of volume commission.

(C) All payment due Arabian Marine under this agreement shall be made in U.S. dollars via telegraphic transfer to The Bank of Tokyo, Ltd., Tokyo Office for account of Arabian Marine Bunker Sales Co., Ltd. Account No. 0857483.

All payment due Exxon under this agreement shall be made in U.S. dollars via telegraphic transfer to Bankers Trust Company, 16 wall Street, New York, New York for account Exxon International Company, Account No. 038-1-089606.

It is further agreed that this addendum supersedes previous addenda dated April 25, 1978 and May 2, 1978 and this addendum is effective with deliveries commencing from January 1, 1981.

Date: January 1, 1981, Jeddah

ARABIAN MARINE OPERATING COMPANY	EXXON INTERNATIONAL COMPANY
/s/ N. Takamiya	_____
N. Takamiya Managing Director	

EXXON INTERNATIONAL COMPANY

1251 Avenue of the Americas, New York, NY 10020

March 3, 1981

Jeddah Bunkering Agreement

Mr. N. Takamiya
Arabian Marine Operating Co. Ltd.
c/o Mitsui OSK
1-1 Toranomon 2-Chome,
Minato-Ku, Tokyo
105 Japan

Dear Mr. Takamiya:

We return herewith, duly executed, copy of addendum to the "Jeddah Bunkering Agreement" concerning the establishment of Arabian Marine Bunker Sales Co., Ltd. through which invoices and payments shall be rendered effective January 1, 1981. Said addendum also incorporates the two previous amendments dated April 25, 1978 and May 2, 1978.

With kind personal regards.

Very truly yours,

/s/ E.J. Matters
E.J. Matters

EJM: cms
Attachment

D3/14

QT

TELEX FROM ARABIAN MARINE BUNKER SALES CO., LTD.

TO MESSRS' EXXON INTERNATIONAL CO., LTD.

ATTN' MR.

DATED: 31ST OCTOBER 1983

RE: BUNKER SUPPLIED TO 'WILLIAM HOOPER' AT JEDDAH ON 26TH OCTOBER 1983

INVOICE NO; T/J03425/1159

QUANTITY	DESCRIPTION	UNIT PRICE USD	AMOUNT USD
4,242.47MT	BUNKER FUEL OIL	180.00	763,644.60
[Handwritten notation: EIC Commission]	LESS ALLOWANCE	3.40	14,424.40
			749,220.20

(U.S. DOLLARS SEVEN HUNDRED FORTY-NINE THOUSAND) TWO HUNDRED TWENTY AND CENTS TWENTY ONLY)

TOTAL USD 749,229.28

ARABIAN MARINE BUNKER SALES CO. LTD.
DULY SIGNED BY A YAWJI

KINDLY EFFECT PAYMENT AS AGREED TO THE BANK OF [ILLEGIBLE] OFFICE, A/C NO. 0857483 FOR ACCOUNT OF ARABIAN MARINE CO., LTD

OFFICIAL INVOICE WILL BE AIRMAILED TO YOU [ILLEGIBLE] IN DUE COURSE

REGARDS
UNQT
BEST REGARDS
S. HAKIM

[Excerpt of deposition of Edward J. Matters attached as Exhibit H to Montbach Affidavit filed 6/23/88]

Arabian Marine charged?

A. Whatever Arabian Marine passed on to us, we pass on to the customer.

Q. Any difference in the price?

A. Not usually.

Q. Would there be a commission of some sort?

A. Commission payable to Exxon for bringing the business to Arabian Marine.

Q. Sir, did there ever come a time when the arrangements that you just described changed in any way?

A. Only with the respect to discounting that became prevalent in Saudi Arabia several years ago and Exxon chose not to participate in granting discounts for delivery to Saudi Arabia, and as such, most of our business was lost. Customers chose to go direct to various suppliers in Saudi Arabia for their bunkers.

In this case, Exxon was not involved in any way.

Q. Did that situation, that type of situation occur with respect to Waterman?

A. Yes, specifically it did.

Waterman came to us like many of our customers saying our prices were not competitive and we could only suggest if they didn't want to buy from us, they could go directly to the supplier and make their own deal for the prices, in which case Exxon was not involved. Except in the case of Waterman, we agreed as a service to the customer to continue to be the vehicle

for which the nomination would get transmitted to the supplier in Saudi Arabia.

We would send a telex out with the nomination.

Q. Did you receive —

A. But, not remuneration at all for Exxon.

Q. I show you a document and I ask you if you can identify it.

A. Yes, that's a memorandum documenting what I just explained.

Q. Was that prepared by you.

A. It was prepared by me.

Q. Was that prepared on or about January 25th?

A. January 25th, 1982. A memorandum to my boss telling him what had happened.

MR. PARÉ: I would like to mark that as Exxon Exhibit 6.

(Memorandum from Mr. Matters dated on or about January 25, 1982, marked as Exxon Exhibit 6 for identification.)

Q. Sir. prior to January 1982, Exxon had been making the deliveries directly?

A. That's correct.

Q. To your customers in —

A. Jeddah, yes.

Q. But after that, those deliveries were being effected by—

A. By the suppliers, independent suppliers in Saudi Arabia on a direct basis.

Q. In addition to the nomination process, did Exxon have any involvement in connection with any of these supplies in Jeddah made directly by AMOCO?

A. Only with respect to Waterman. We accepted the nomination and passed them on to the supplier in Jeddah. Arabian Marine Operating Company.

Q. I show you another document and I ask you if you can identify that.

A. This was subsequent to them taking over the business in October.

Q. They being whom, AMOCO?

A. AMOCO took the business over as I said in January of '82.

During the year of '82, periodically Waterman was late in their payments and the supplier would let me know about it. We would pass on the information to our treasury people and our salespeople for their information and I would imagine that was passed on to Waterman, and Waterman would settle now and then with the supplier.

And, this was a cable from one of the principals in Japan of Arabian Marine thanking me for what he thought was our direct assistance, but in essence we really took no direct action in getting Waterman to pay.

Q. So this document is an example of —

A. Our —

Q. — correspondence concerning —

A. Concerning Waterman.

Q. Nonpayment from Waterman to AMOCO?

A. Yes.

Q. AMOCO is the short name for what?

A. Arabian Marine Operating Company. AMOCO sounds too much like the oil company but it is a lot easier to say.

Q. This document reads below it, "Mitsui OSK Lines, Tokyo."

A. Mr. Takamiya is one of the directors of Arabian Marine Operating Company and also an employee of Mitsui OSK Lines that owns 40 percent of the Arabian Marine Operating Company.

MR. PARE: I would like to mark this as Exxon Exhibit No. 7.

(Letter from Mr. Takamiya to Mr. Matters marked as Exxon Exhibit 7 for identification.)

Q. Sir, if I may, I would like to go back to January of 1980 for a moment again. That was when this changeover took place.

A. January '82.

MR. O'BRIEN: '82?

Q. January of '82?

A. Right.

Q. Did you personally have any conversation with the Arabian Marine Company concerning the changeover?

A. Yes, because at the time in return for us passing the nominations on, Arabian Marine wanted to reimburse us for expenses incurred, cables, telex expenses and things like that. We didn't want to accept any remuneration at all. It's their direct base and we didn't want to get involved at all.

The service to the customer, we continued to do that.

Q. Were you the person in contact with Arabian marine?

A. Yes.

Q. When they had a problem of collection, they would get in touch with you personally?

A. Yes.

Q. I would like to show you another document and

[Excerpt of deposition of Adam V. Rudski attached as Exhibit I to Montbach Affidavit filed 6/23/88]

A. Yes.

Q. So on October 26, Arabian did furnish the bunkers to the WILLIAM HOOPER?

A. Yes.

MR. MAVRONICOLAS: Central Gulf Exhibit 11 which is a telex dated October 3, 1983.

(Whereupon, telex dated October 3, 1983 is marked as Central Gulf Exhibit 11 for identification)

Q. You have seen this before?

A. Yes, I have seen this.

Q. Now, that's a message from who to who?

A. That's a message from Arabian Marine to Exxon International that —

Q. Attention Mr. Blank?

A. This is going to the comptroller's department and this is fundamentally an invoice for payment for deliveries made to an Exxon customer.

Q. What does — there is a handwritten note which says EIC commission in the amount of $14,424.40. What does that mean?

A. That means that Arabian Marine pays Exxon a fee for bring in the customer to the Jedda port.

Q. Do you have any documentation reflecting that arrangement?

A. Yes, there is, I believe, a contract between Arabian Marine and Exxon.

Q. Is there any percentile attached to it?

A. I think, speaking just from memory, I believe there are certain percentiles relating to certain volumes. It's not uniform.

There is a certain X number of barrels you might get such a flat fee and above that you get some kind of additional escalating fees.

MR. O'BRIEN: I call for the production of the document reflecting this arrangement between Exxon and Arabian Maritime.

Q. So that the real price of what Arabian Maritime furnished to the WILLIAM HOOPER was $749,220.20; is that right?

A. The price to Waterman was $763,000. That's the price that is published at Jedda. I believe this is 180 U.S. dollars per ton which is the published price at the time published by Arabian Marine in Jedda and that would be the price paid.

Q. All Arabian Maritime would wind up with would be $749,000?

[Excerpt of deposition of Adam V. Rudski attached as Exhibit J to Montbach Affidavit filed 6/23/88]

Q. What was the practice before 1982?

A. Practice was that Waterman vessels were supplied by Exxon using Arabian Marine Company in Jedda as our supplier.

Q. And did you take the responsibility — let me ask you the first question, who is Arabian Maritime Marine?

A. What was the name Arabian Marine? I believe it is a supplier in Jedda, Saudi Arabia. To my knowledge it is 50 percent owned or so. Maybe 49 percent by Mitsui OSK, a Japanese trading company and 50 or 51 owned by Saudi Arabian national interests.

Q. Is Mitsui your best customer in Japan?

A. He is one of our big customers, yes.

Q. Before 1982, what would be the procedure when Waterman wanted to bunker a vessel in Jedda?

A. They would place a nomination which is an order with Exxon International Company, and Exxon International would then advise Arabian Marine in Jedda and request them to bunker that vessel, whatever the volume, the date and all the pertinent information to that order.

The order would be made and Arabian Marine will send the invoice to Exxon to be paid for the delivery of bunkers, and Exxon would invoice Waterman and Waterman would pay.

Q. So that Exxon stood behind or was responsible to Arabian Marine?

MR. PARÉ: Object to the form of the question. If it calls for a legal conclusion, I am not sure I understand that.

MR. O'BRIEN: We will get to that.

Q. You can answer the question. There is nothing wrong with the form.

A. Waterman was a customer of Exxon. So Exxon would — if you are asking about credit risk, it was clearly Exxon's credit. We extended the credit to Waterman.

Q. What happened after 1982?

A. (There was no response)

Q. Or in 1982?

A. In 1982, or thereabouts, to my knowledge, prices in Jedda, some of the suppliers in Jedda were offering discount to shipping companies.

Exxon had some question as to whether this was proper to offer discounts in Saudi Arabia, and therefore, would not grant discounts to any of it's shipping customers for delivery in Saudi Arabia.

In order to allow Waterman to benefit from the lower prices which apparently were available from other suppliers in Jedda, it was agreed that Waterman would purchase directly from Arabian Marine, and pay Arabian Marine directly for the deliveries in Jedda.

Q. Arabian Marine would then send out an invoice directly to Waterman?

A. Directly to Waterman, that's correct. The orders, however, were still placed by Waterman with Exxon even for that period, because — so that Waterman can use the facility of our telex system, our computer system that would send the requests to Jedda for the information. We did this as a service to Waterman, make those communications link between Waterman and Jedda.

Q. Arabian Marine was the supplier?

A. Arabian Marine was the supplier.

Q. They billed Waterman directly?

A. They billed Waterman.

Q. And they would say to Waterman on their invoice?

A. They would presume. I have not seen what invoice from Arabian Marine to Waterman.

Q. Now, did that situation change?

A. That situation changed in approximately middle of October of 1983.

MR. MAVRONICOLAS: Mark as Central Gulf Exhibit 6 a document entitled Waterman Steamship Corporation private.

(Whereupon, document entitled Waterman Steamship Corporation, private is marked as Central Gulf Exhibit 6 for

[Excerpt of deposition of James E. Sharkey attached as Exhibit K to Montbach Affidavit filed 6/23/88]

Q. And they would telex the information to AMOCO?

A. Yes.

Q. Where would they telex it to, Jiddah or someplace else?

A. I believe it was Jiddah. Frankly, I don't specifically recall. I believe it was Jiddah.

Q. And you say immediately thereafter, a followup telex would be sent cancelling it?

A. We had, by this point in time, had the Mariner system, which was a computer nomination procedure, and the Mariner would record the original transmittal of the order to Jiddah and once it was acknowledged by AMOCO that they had received the order and, in effect, acknowledged that they were prepared to make the delivery, we would then cancel the nomination in the Mariner system so there was never any billing involved.

Q. Who entered the information to the computer, was that the order and shipping?

A. Order and shipping people.

Q. And would that computer send something to AMOCO or was it a separate telex that went to AMOCO?

A. I'm not clear on that. As I say, I have a working knowledge of the order and shipping room but I don't know the specifics. I — there was a preconceived methodology on how orders would be passed. AMOCO knew that we were placing the orders on behalf of Waterman but we were not going to be the purchaser of the product. It was a matter of communicating and that we would place the order and then cancel it.

Q. Was the Mariner system an internal Exxon system or was it hooked into AMOCO or other people world-wide?

A. No, it was an internal system.

Q. So you were cancelling the order internally so that your people — correct me if I'm wrong — would not issue an invoice to Waterman for this supposed order.

A. That's correct.

Q. And AMOCO would issue their invoice to someone?

A. Directly to Waterman.

Q. Directly to Waterman. Okay. Would you go back to Waterman at any time and tell them that everything had been placed and all was well?

A. No. As I said earlier, we only went back

[Excerpt of deposition of James E. Sharkey attached as Exhibit M to Montbach Affidavit filed 6/23/88]

your evaluation of Waterman's general condition during these meetings?

A. No.

Q. You were not worried about the fact that they may have run up a credit line with AMOCO that might impact on their ability to pay Exxon the money that was owed them?

A. Jim Sharkey, personally, did not. I had no concerns.

Q. Did others at the meeting discuss those things?

A. Not in my presence.

Q. Okay. Were you aware of what the credit arrangements, if there were any, that Waterman had with AMOCO were?

A. I knew — I learned of it long after the fact, but I was not aware of it at the time.

Q. When you say "long after the fact," you're talking after October 1983.

A. About October 1983. Within the month of October '83.

Q. How did you find out about that?

A. The Waterman people had been dealing directly with AMOCO up until the mid-part of October. And AMOCO came back to Exxon and asked us did we take a direct role in the placement of the Waterman orders.

Q. What do you mean by "direct role"? Did you talk to somebody at AMOCO?

A. No. The conversation was between a gentleman named Hakim and Mr. Matters.

Q. And how did you find out about this?

A. Since I was a salesman, I was made aware that this conversation had taken place.

Q. I'm sorry. I didn't mean to interrupt you. What was the gist of this conversation?

A. AMOCO wanted to know or actually asked Exxon to revert back to the old procedure where we physically placed the nominations and in effect accepted the credit responsibility for the payment of the oil. And we were somewhat concerned about that turn of events. It would have effectively meant that we would be taking on an added financial burden by assuming this role.

Q. You were going to guarantee the —

A. We would purchase for resale, yes.

Q. Pardon me?

A. We would have to purchase for resale, as we would in the days prior to Waterman going directly to AMOCO.

Q. When did this happen?

A. I can't be specific; but I would say it was in the very early days of October 1983.

Q. Did you make any notes with regard to this?

A. No, not that I'm aware of.

Q. Okay. Did you talk to anyone at Waterman with regard to this?

A. Oh, yes. I spoke with Bill Ryan and — let's see how to phrase it — he was aware, of course, that AMOCO were looking to have the relationship revert back to Esso, Exxon, and I had expressed to Bill that we weren't all that enthused about doing it but that we had an open mind.

Q. Now, did there come a time when a specific vessel was involved, the bunkering of a specific vessel?

A. Yes. Around mid-October, Mr. Hakim of AMOCO basically called Mr. Matters and said that the were reluctant to supply this particular ship, the Waterman vessel, in light —

Q. Do you recall what vessel it was?

[Excerpt of deposition of Adam V. Rudski attached as Exhibit N to Montbach Affidavit filed 6/23/88]

thanks. I don't know — this may be — oh, this may be initials of a vice-president of Exxon International Company, Mr. Latimer, I think. But I am not one hundred percent sure.

Q. What does it say above that?

A. (There was no response)

Q. Presentation?

A. Presentation to follow. I think this was a comment that we'll make a presentation, we, in other words, the financial department or treasurer's department to senior management as to what has happened or what the developments were with Waterman. So this is just a note that there will be presentation to follow.

Q. And you prepared this?

A. And I prepared this draft of this memorandum, yes.

Q. I notice There is a line through it.

A. That's correct, because that was a draft it has been, when the secretary retypes it, she puts the line that she has taken care of this particular page. That's her way of saying I have done it.

Q. Turn to the second page if you would. I don't believe the pages are numbered. It appears to be the second page, entitled recent developments. It starts out by saying coincidentally with the 2 Q 83 results becoming available we were approached by Arabian Maritime Operating Company, our supplier in Jedda, that they wished to revert business to Exxon. How did they approach you?

A. Over the telephone.

Q. These are the conversations that we had before, perhaps may be reflected in some notes in the commercial department.

A. Yes.

Q. Then you say, since our agreement with Arabian Marine, then I am transposing what you did, (40 percent owned by Mitsui our major Japanese customer) when they took over Waterman was on the basis that we stand behind Waterman. We agreed to take Waterman's Jedda business as of October 15, 1983.

A. Right.

Q. And you use the phrase to stand behind Waterman, right?

A. Right.

Q. What does stand behind mean?

A. Well, it meant to me that we, Waterman has been traditionally our customer for a number — as I mentioned, for 40 years and that we would not let Waterman down at this point by not accepting deliveries, especially since this agreement was made in order to provide Waterman with better prices, but they still basically remained our customer all the time.

Q. You were going to stand behind them?

A. What we had said here we would not let them go. Arabian Marine would refuse to supply them, we felt that we're not going to hang up a ship of a customer of ours for 40 years and we're going to arrange that the delivery be made on credit.

Q. Generally wasn't that the philosophy at the time that you were going to stand behind Waterman and not be the first one to possibly pull the plug on them?

A. That was the basis of the outstanding relationship, that's correct.

Q. Then turn to the third page, and then you refer to our position with regard to maritime liens may be better. Of the 2.5 million receivables about 780 thousand is on deliveries to a ship which Waterman charters from Central Gulf Lines.

A. Correct.

Q. And is that 780 thousand a reference to the WILLIAM HOOPER?

A. That is in reference to the WILLIAM HOOPER.

Q. At this time the WILLIAM HOOPER had been bunkered?

A. Correct.

Q. No doubt about it, it was clear in your mind that that ship was chartered from Central Gulf?

A. That's correct.

MR. PARÉ: At what point in time?

MR. O'BRIEN: As of December 2, 1983. He told

[Excerpt of deposition of James E. Sharkey attached as Exhibit O to Montbach Affidavit filed 6/23/88]

have no idea. It does not mean anything to me.

Q. Now, getting back to the WILLIAM HOOPER, it's your impression, sir, that a renomination was sent out sometime between October 19th and the 26th?

A. Yes.

Q. A cable. And that's what I've asked you to produce; okay?

Did you discuss the WILLIAM HOOPER with Mr. Ryan at any time during that time period?

A. In what reference?

Q. With regard to the fact whether or not Exxon was going to take the responsibility for paying for that.

A. Yes, we informed them that we would review each ship as it came up and at a point in time, I'm sure we told them we were going to supply the HOOPER. I can't be specific as to the time and place, though.

Q. Did you make any notes with regard to that?

A. No.

Q. Did you tell anyone else at Exxon that you were going to do that?

A. It wasn't a decision that I made. So it

[Excerpt of deposition of Adam V. Rudski attached as Exhibit P to Montbach Affidavit filed 6/23/88]

Sharkey that we have already entered into this, that we have reviewed it with Waterman and agreed to take some deliveries.

MR. O'BRIEN: I don't remember seeing that.

A. I may be confusing this.

MR. PARÉ: The witness is referring to Central Gulf Exhibit 6.

Q. Is Sharkey in there?

A. That was written by Jim Sharkey and documents the various visits with Waterman and the things that we were deciding or not deciding to do. But —

Q. I don't think that's the answer to my question. I can't remember my question, but I don't think that's the answer to it.

A. I think you asked — God, maybe we should start again.

(Testimony read)

Q. Now, in the last section of that memo, outlook, you again referred to the 780 thousand dollars on a delivery of a ship which Waterman chartered from Central Gulf Lines?

A. Right?

Q. That's in accordance with the prior draft memorandum?

A. That's correct.

Q. When you decided to make these standby or the one standby delivery on the WILLIAM HOOPER which concerns us, was this done on the basis that you would be directly responsible to Arabian Maritime?

A. Yes, that we would pay Arabian Maritime, Arabian Marine for those deliveries.

Q. Finally, in regard to this memorandum, there are several references to your continued efforts to obtain a letter of credit from Waterman to secure their position.

A. Yes.

Q. Let's turn to the old WILLIAM HOOPER itself, strike that old.

Before the vessel arrived in Jedda, what happened in regard to the bunkers?

A. Could you clarify that.

Q. How did the situation develop in regard to the bunkers that were being stemmed for the WILLIAM HOOPER, who placed the order, who received the orders and what was done?

A. Waterman normally placed orders with Exxon, considerable length of time ahead of the actual deliveries.

Being a liner service, buying continuously from Exxon, they would place nominations sometimes as long as a month in advance. The beginning of the month they said these are potential deliveries.

That I don't know, when that particular delivery was placed. It came through Exxon because we took all the deliveries whether they were in Jedda on behalf of Arabian Marine as I mentioned before or on our own account in other ports.

It always came through us. However, therefore, I would think that at the time this order reached Jedda, Jedda was not or Arabian Marine was not yet prepared or has not yet decided whether they would or would not supply this particular delivery directly or give it back to Exxon.

Q. They weren't clear themselves as to what arrangements they were working under then?

A. I would think so. I would think since this was a very tight schedule as you have referred, we made a delivery on the one days notice. It was a very tight schedule for them. And they probably have taken the order originally, it came through to them as being on their own account.

MR. PARÉ: Just for clarification, by them and they you mean Arabian Marine?

THE WITNESS: Yes, Arabian Marine, Arabian Marine would have thought it was for their accounts when the nomination originally reached Jedda, that I would guess that.

Q. Do you remember any messages in Exxon's file that were exchanged concerning this?

***

[Excerpt of deposition of James E. Sharkey attached as Exhibit S to Montbach Affidavit filed 6/23/88]

A. I think it was the STONEWALL JACKSON.

Q. Had you been involved with the nomination for that ship?

A. Yes.

Q. When had that taken place?

A. Waterman were of the habit of placing their nominations well in advance so that nomination could have been placed with AMOCO at least a month prior to the physical requested loading date, so I can't recall specifically when it was placed but well in advance of the loading date.

Q. And that would have followed the procedure we spoke of before, with the form having been filled out, AMOCO would have been advised by the order and shipping room —

A. Yes.

Q. — and then there would have been a cancellation on your internal —

A. Mariner system.

Q. — Mariner system. Do you have available to you today the form that you filled out with regard to the STONEWALL JACKSON for mid-October 1983?

A. I saw the form yesterday. I don't know if we have it here with us today.

[Excerpt of deposition of Adam V. Rudski attached as Exhibit W to Montbach Affidavit filed 6/23/88]

Q. And then it says that AMOCO, you have that paragraph?

A. Yes.

Q. Then it says that Exxon in view of AMOCO, and that's Arabian American Oil Companies supply direct to Waterman has agreed to take the business on a case by case basis. Is that correct?

A. That's correct.

Q. And that you would extend additional credit line of 1.5 million to 2.5 million, is that correct?

A. That's correct.

Q. How high had Waterman's previous credit line been?

A. 6 million dollars was generally Waterman's.

Q. That's a very, very generous credit line?

A. That's the credit line to meet the requirement of the company. When we had deliveries in both Jedda and in the U.S. East Coast where they would primarily buy, 6 million was what was needed to sustain the line.

It was then maintained at approximately 3 million dollars when Jedda was being supplied by Arabian Marine directly, and in this case we're referring to the fact that Jedda orders amount to anywhere between 1 and a half and two and a half million dollars a month, which would bring the line back to the five to 6 million.

* * *

thanks. I don't know -- this may be — oh, this may be initials of a vice-president of Exxon International Company, Mr. Latimer, I think. But I am not one hundred percent sure.

Q. What does it say above that?

A. (There was no response)

Q. Presentation?

A. Presentation to follow. I think this was a comment that we'll make a presentation, we, in other words, the financial department or treasurer's department to senior management as to what has happened or what the developments were with Waterman. So this is just a not that there will be presentation to follow.

Q. You prepared this?

A. And I prepared this draft of this memorandum, yes.

Q. I notice There is a line through it.

A. That's correct, because that was a draft and it has been, when the secretary retypes it, she puts the line that she has taken care of this particular page. That's her way of saying I have done it.

Q. Turn to the second page if you would. I don't believe the pages were numbered. It appears to be the second page, entitled recent developments. It starts out by saying coincidentally with the 2 Q 83 results becoming available we were approached by Arabian Maritime Operating Company, our supplier in Jedda, that they wished to revert business to Exxon.

How did they approach you?

A. Over the telephone.

Q. These are the conversations that we had before, perhaps may be reflected in some notes in the commercial department.

A. Yes.

Q. Then you say, since our agreement with Arabian Marine, then I am transposing what you did, (40 percent owned by Mitsui our Major Japanese customer) when they took over Waterman was on the basis that we stand behind Waterman. We agreed to take Waterman's Jedda business as of October 15, 1983.

A. Right.

Q. And you used the phrase to stand behind Waterman, right?

A. Right.

Q. What does stand behind mean?

A. Well, it meant to me that we, Waterman has been traditionally our customer for a number — as I mentioned, for 40 years and that we would not let Waterman down at this point by not accepting deliveries, especially since this agreement was made in order to provide Waterman with better prices, but they still basically remained our customer all the time.

Q. You were going to stand behind them?

A. What we had said here we would not let them go. Arabian Marine would refuse to supply them, we felt that we're not going to hang up a ship of a customer of ours for 40 years and we're going to arrange that the delivery be made on credit.

Q. Generally wasn't that the philosophy at the time that you were going to stand behind Waterman and not be the first one to possibly pull the plug on them?

A. That was the basis of the outstanding relationship, that's correct.

Q. Then turn to the third page, and then you refer to our position with regard to maritime liens may be better. Of the 2.5 million receivables about 780 thousand is on deliveries to a ship which Waterman charters from Central Gulf lines.

A. Correct.

Q. And is that 780 thousand a reference to the WILLIAM HOOPER

A. That is in reference to the WILLIAM HOOPER.

Q. At this time the WILLIAM HOOPER had been bundered?

A. Correct.

Q. No doubt about it, it was clear in your mind that that ship was chartered from Central Gulf?

A. That's correct.

MR. PARÉ: At what point in time?

MR. O'BRIEN: As of December 2 1983. He told us already that he knew from January, 1980 the vessel was under charter.

MR. MAVRONICOLAS: Central Gulf 10, memorandum dated December 6, 1983.

(Whereupon, memorandum dated December 6, 1983 is marked as Central Gulf Exhibit 10 for identification)

Q. Now, this is another memorandum, what is the date?

A. December 6.

Q. This is prepared by you?

A. Yes.

Q. And it goes from who to who?

A. From R.J. Dupont to R.N. Dolph.

Q. Have we identified Mr. Dupont?

A. Yes, the treasurer, and Mr. Dolph is the president. In fact, it is the same memorandum, except the first one you have seen is a draft, this is the final.

Q. Turn to the second page if your would, please. Entitled recent developments?

A. Right.

Q. Is it fair to say that Arabian Maritime was no longer willing to extend credit to Waterman in view of the high exposure?

A. That's correct.

Q. And they requested you take back the direct responsibility of the Jedda deliveries which was in keeping with the original understanding between Exxon and AMOCO?

A. Yes.

Q. As I understand that arrangement, you would receive an order from Exxon and then relay it to American Arabian Maritime and they would bunker the ship?

A. Order from Waterman.

Q. You are right. You would receive an order from Waterman and then you would relay it to Arabian —

A. Marine, right.

Q. So in effect you were subcontracting the work to Arabian?

MR. PARÉ: Objection, calls for a legal conclusion.

A. I don't know the legal meaning of that. Arabian Marine is our supplier in Jedda, supplies on our behalf.

Q. You were using them?

A. Yes.

Q. You weren't furnishing the supplies yourself?

A. No.

Q. Now again, in this particular area of Arabian Marine asking you to take back the direct responsibility, is there anything apart from what you just testified, any messages which would indicate those words, direct responsibility.

A. No, not to my knowledge, no.

Q. those words are your words?

A. Those are my words.

Q. Now, turn to the next paragraph.

A. Yes.

Q. And you say accepting this proposal would lead to a high level — I am sorry, I will read the whole thing to you: Accepting this proposal (in itself a sign that a third party was losing confidence in Waterman) would have led to a level of exposure which we thought would be unacceptable in the light of Waterman's first half 1983 results; right?

A. Right.

Q. You did not want to entertain the proposal?

A. No. We were not too keen on extending additional credit to a company that was in difficulty.

Q. Understandable. So did you reject that proposal?

A. No. We did not reject the proposal outright, because we did supply maybe — we made two or three deliveries. I don't recall off-hand. I think two in Jedda in the period of October 15 and December 1.

Q. Then you go on to say, however in mid October we were abruptly informed by AMOCO that they would no longer supply Waterman.

A. That's correct.

ADDENDUM TO JEDDAH BUNKERING AGREEMENT

With reference to "Jeddah Bunkering Agreement" (dated May 1, 1977 and "Addendum to Jeddah Bunkering Agreement" dated February 12, 1981, it is this day mutually agreed between Arabian Marine Operating Company (hereinafter called Arabian Marine) and Exxon International Company (hereinafter called Exxon) that the commission payable to Exxon in the Clause "PAYMENT" be amended as follows: —

(1) Arabian Marine shall pay a commission of USD 3.40 (U.S. Dollars three and cents forty only) per metric ton in place of the old rate of 1.75 percent of invoiced product price and additional volume commission reaching maximum USD 1.25 per metric ton.

(2) The above (1) shall become effective on and after October 19, 1983 at Jeddah.

Date: December 21, 1983

Arabian Marine Operating Co. Ltd.	Exxon International Company
/s/ N. Takamiya	/s/ [Illegible]
N. Takamiya Managing Director	

[ILLEGIBLE] NOV 16 11 58 AH 83
THEMOLINE TOKYO JAPAN
ATTN: N. TAKAMIYA
GENERAL MANAGER TANKER DEPT.
MITSUI OSK LINES LTD.

THANKS YOUR TELEX DATED NOV 7, 1983. WE HOPE THE NEW ARRANGEMENT WITH WATERMAN WILL PROVE SATISFACTORY FOR ALL CONCERNED. AS AGREED WITH MR. E. HAKIM OUR NEW COMMISSION IS A FLAT 3.40/T WHICH I SUGGEST BE FORMALIZED BY A LETTER FROM ARABIAN MARINE TO MY ATTENTION AMENDING OUR EXISTING AGREEMENT EFFECTIVE DAY OCTOBER FIRST. WE ARE PLEASED TO BE ABLE TO CONTINUE TO WORK CLOSELY WITH YOU IN BOTH JEDDAH AND TO SERVE YOUR WORLDWIDE BUNKER REQUIREMENTS. IN THIS RESPECT PLEASE PERMIT ME TO SAY THAT WE ARE DOING EVERYTHING POSSIBLE TO PROVIDE COMPETITIVE PRICES AT U.S. EAST COAST ROUTE, BUT ARE NOT BEING VERY SUCCESSFUL DUE TO MARKET CONDITIONS.
WE UNDERSTAND ESSO [ILLEGIBLE] AND YOUR OFFICE ARE WORKING TO TRY TO OBTAIN SOME OF YOUR EUROPEAN VOLUME OR AT LOCATIONS WHERE WE CAN PROVIDE COMPETITIVE PRICES, QUALITY AND SERVICE. MY CURRENT PLAN IS TO VISIT TOKYO IN MID TO LATE MARCH NEXT YEAR AND I LOOK FORWARD TO SEEING YOU THEN.

WITH KIND PERSONAL REGARDS
EJ MATTERS/EXXO [ILLEGIBLE]
EXXON INTERNATIONAL CO.

[Excerpt of deposition of James E. Sharkey attached as Exhibit Z to Montbach Affidavit filed 6/23/88]

Q. Is that correct? And you were present at those meetings?

A. Yes.

Q. And what was discussed at those meetings? Let's take the November 4th meeting first.

A. Let me just read this and refresh myself.

Q. Sure.

(Witness perusing document.)

A. About this time, in this time period, we were becoming more keenly concerned about credit terms for all of our accounts and Waterman specifically. So now that we had assumed the Jiddah obligations, our exposure had been increased by upwards of over a million dollars. And as a consequence, we were making preliminary discussions with Waterman toward the notion of maybe obtaining some form of security.

We didn't specify that we, or didn't insist on anything at this stage of the game, but sort of were exploring ways of protecting our exposure, such as opening a letter of credit or prepaying some orders. But they were basically exploratory talks.

Q. Did you present Waterman with any summary

* * *

[Excerpt of deposition of James E. Sharkey attached as Exhibit AA to Montbach Affidavit filed 6/23/88]

credit ratings, they were still a sterling account as far as we were concerned. They had continually paid their bills in very timely fashion, oftentimes days before the due date.

We were concerned but we had been give verbal assurances by the Waterman management and —

Q. Who?

A. This would be Bill Ryan and the President, Ed Walsh.

Q. Assurances as to what?

A. That "We're a viable, ongoing firm; yes, we're having some problems but we have excellent banking relations with Manufacturers Hanover and they are going to see us through this crisis."

Q. So for that reason, Exxon decided to guarantee these payments to AMOCO.

A. That's correct.

Q. What did you think would have happened to Waterman if you had not —

MR. PARÉ: Objection. What he thinks would have happened as to anything is objectionable. It's speculation.

Q. Were there discussions as to what would happen to Waterman if you did not agree to guarantee

* * *

PRIVATE

WATERMAN STEAMSHIP CORPORATION

EXXON CONCERNS:

- Waterman's continued losses at increasing rate with 2nd QTR 1983 loss $13.5M and severe loss of equity.

- Amoco unwilling supply Jeddah fuel direct to Waterman. In order to avoid disruption of Waterman operations Exxon agreed on case by case basis to assume additional $1.5M/$2.5M credit exposure on these deliveries.

- Waterman's U.S. Gulf bunker fuel business has been non-profitable over last few years due to Exxon USA high cost purchases.

Above concerns triggered mutual need for Exxon/Waterman management meeting to resolve future Jeddah business and discuss Waterman's financial outlook.

MEETINGS

- October 27th (Thursday) - Exxon Treasurers (R.J. Dupont/A.V. Rudzki) met with Waterman Pres. & CEO E.P. Walsh and Sr. VP Traffic W. Ryan. Waterman presented optimistic outlook and indicated Manufacturers Hanover Bank support. Exxon accepted comments but reserved option to revert to Waterman after internal review and banking input of Waterman business line.

- November 2nd (Wednesday) - Exxon Treasurer called upon Manufacturers Hanover Bank representatives however banker representing Waterman account declined to attend meeting thus raising further Exxon concerns.

- November 4th (Friday) - Exxon Commercial Messrs. Sharp/Sharkey met with Waterman's Messrs. Walsh/Ryan to restate Exxon Treasurer's pressure for account

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IN THE

Supreme Court of the United States

OCTOBER TERM 1990

No. 90-34

EXXON CORPORATION,

Petitioner,

—against—

CENTRAL GULF LINES, INC., *in personam*, and the M/V GREEN HARBOUR (ex WILLIAM HOOPER) *in rem*, her engines, boilers, tackle, etc. and a certain Letter of Credit No. P 621208 dated December 26, 1984 issued by the Chase Manhattan Bank, N.A., *in rem*,

Respondents.

BRIEF FOR RESPONDENTS CENTRAL GULF LINES, INC., *ET AL.*

Statement of the Case

I. The Facts:

This litigation involves a claim by Petitioner Exxon Corporation ("Exxon") for a maritime lien against Respondent Central Gulf Lines' ("Central Gulf") vessel for arranging the supply of bunkers to the vessel by a local supplier in Saudi Arabia.

Respondent Central Gulf owned the United States flag vessel M/V GREEN HARBOUR (ex. WILLIAM HOOPER) ("the HOOPER" or "the vessel") (J.A. 72), which vessel was bareboat chartered to Waterman Steamship Company

("Waterman") and used by Waterman in its common carrier service between the United States and ports in the Middle East (J.A. 72). The charter party contained a "no lien" clause. (J.A. 72).

Exxon entered into a contract with Waterman pursuant to which it was agreed that Exxon was to act as Waterman's exclusive, worldwide provider of bunker fuel oil (J.A. 20-34, 72). Pursuant to this agreement, Exxon procured fuel for vessels owned or chartered by Waterman either by supplying the fuel directly itself, or by making arrangements with local independent supplymen to have fuel supplied to vessels nominated by Waterman at ports where Exxon did not have its own fueling stations (J.A. 20, 73-74; Pet.App. A5-6; A29-30).

As contemplated by the Exxon-Waterman agreement, Exxon entered into a brokerage agreement with a local supplier in Jeddah, Saudi Arabia, Arabian Marine Operating Company ("Arabian Marine") (J.A. 73, 82-98). Under the terms of this agreement, Arabian Marine retained Exxon to "solicit and arrange" customers for the sale of marine fuels to be delivered to the customer's vessel directly by Arabian Marine. Title to the fuel was to pass directly from Arabian Marine to the receiving vessel, with Exxon receiving payment for its services from Arabian Marine in the form of a commission. (J.A. 83, 68, 70).

For the better part of 40 years, Exxon arranged for the supply of Waterman's worldwide bunkering needs pursuant to their contract (Pet.App. A4, 13, 20; J.A. 117). In order to facilitate Waterman's payment for the fuel, Exxon extended a credit line to Waterman, which credit line, at the time of the delivery at issue, had reached six million dollars (J.A. 124).

Due to certain price advantages given by local suppliers to their customers for fuel liftings in Jeddah, Exxon and Waterman agreed to Waterman's direct purchase of fuel from Arabian Marine, starting in January 1982 (J.A. 60, 63, 109). By October 1983, however, Waterman's financial situation had deteriorated and, in mid-October 1983, Arabian Marine approached Exxon with the request that Exxon guarantee payment of fuel supplies Arabian Marine delivered to Waterman vessels and revert to the Exxon-Arabian Marine agreement (J.A. 75, 101-105). Exxon agreed and took responsibility for an order previously placed by Waterman with Arabian Marine, on September 29, 1983, for a supply of fuel to be delivered to the HOOPER at Jeddah on or about October 26, 1983 (J.A. 60, 75, 119). To facilitate this lifting, Exxon increased Waterman's then existing credit line of approximately three million dollars by an additional 1.5 to 2.5 million dollars, well in excess of the cost of the anticipated Jeddah fueling (J.A. 77, 124, 135). At the same time Exxon requested that Waterman arrange for accounts receivable security with its bank (J.A. 77, 136). Shortly after the October 26, 1983 lifting, Exxon was told by Waterman that they had been unable to arrange this security (J.A. 136).

On October 31, 1983 Arabian Marine invoiced Exxon for the cost of the fuel supplied to the HOOPER, allowing a deduction for the commission earned by Exxon (J.A. 70). Exxon paid Arabian Marine the net amount and invoiced Waterman for the cost of the fuel plus commission (J.A. 69). On December 1, 1983, sought reorganization under Chapter XI of the Bankruptcy laws (J.A. 14, 77). To date, Exxon has received at least $513,485.91 in payments made by Waterman under its Chapter XI proceeding.

II. The Proceedings Below:

Exxon commenced an action *in rem* under general maritime law and the provisions of the Federal Maritime Lien Act (FMLA or Act), 46 U.S.C. § 971, *et seq.*[1] (1982), for the enforcement of alleged maritime liens for bunkers supplied in New York and Jeddah. A motion for summary judgment was made by Exxon and Central Gulf cross-moved arguing that, as a matter of law, no enforceable liens existed.

By Opinion and Order dated March 3, 1989 (Pet. App. A22-35), the District Court granted Central Gulf's motion denying Exxon a maritime lien with regard to the Jeddah delivery, on the basis that Exxon was acting as an

1 Now codified at 46 U.S.C. §§ 31301(4), 31307, 31341 and 31342.

agent for Waterman, rendering preliminary services which did not fall within the periphery of maritime jurisdiction. The District Court reasoned that no maritime lien could arise out of a non-maritime contract (Pet.App. A32), adhering to the holding in *Peralta Shipping Corp. v. Smith & Johnson (Shipping) Corp.*, 739 F.2d 798 (2d Cir. 1984), *cert. denied*, 470 U.S. 1031, *reh'g denied*, 471 U.S. 1112 (1985), and following *Minturn v. Maynard*, 58 U.S. (17 How.) 476 (1854). (Pet. App. 28). The District Court, however, did award Exxon a lien for bunkers supplied by itself at New York.

Notwithstanding the fact that the Exxon-Waterman contract was called a sale contract, the District Court interpreted it to be an agency agreement whereby Exxon would either hire itself to deliver the fuel, as they did for the New York delivery, or make arrangements with a local supplier, as they did in the case of Jeddah deliveries (Pet. App. A30-34).

Other factual findings of the District Court not contained in Petitioner's brief, but relevant to this dispute, are that: (1) as opposed to the New York delivery, Exxon never actually held title over the fuel delivered at Jeddah; (2) Exxon received payment for its services from Arabian Marine in the form of a commission deducted from its invoice to Exxon; and (3) "the locus of Exxon's relationship with Waterman was the United States, not the dock in Jeddah" (Pet.App. A30). Moreover, the District Court found that Exxon had failed to claim a lien on the ground that it advanced funds needed to fuel the vessel (Pet.App. A32) and that, even if Exxon had made such an argument, the holding in *Minturn*, *supra*, would preclude the assertion of a lien.

Upon motion for reargument, the District Court affirmed its earlier decision and, in addition, held that Exxon was only obligated to exercise its best efforts to procure fuel for Waterman (Pet.App. A8); Exxon's likelihood of profit or loss was fixed (Pet.App. A8); Exxon's performance was subject to Waterman's control, with the latter designating fuel type and quality, method, location and time of delivery (Pet. App. A10); and that Exxon's extension of credit was incidental to its long-standing agency relationship with Waterman (Pet.App. A20). The District Court, re-emphasizing the 40-

year business relationship and the preliminary character of the services rendered, again found that Exxon acted as a general agent. The District Court, declined a request that it award a lien on the basis of a distinction between general and special agency agreements, concluding that *Peralta*, *supra*, was not limited to general agency contracts (Pet.App. A12-16).

The court also rejected Exxon's claim, presented for the first time in their motion to reargue, that a lien existed due to their extension of credit to the vessel, holding that Exxon's advancing of funds was in the ordinary course of performing its long-term agency contract. (Pet.App. A20). The court reasoned that an agent, who provides preliminary services, cannot be "bootstrapped" into admiralty jurisdiction by advancing funds. (Pet.App. A19).

The Court of Appeals affirmed the lack of admiralty jurisdiction "substantially for the reasons given in Judge Connor's two thorough opinions" (Pet.App. A2).

Summary of the Argument

In urging reversal of the Judgment of the court below, Petitioner questions the validity of *Minturn v. Maynard*, *supra*, both at the time it was rendered and at the present. The *Minturn* ruling, however, was based upon sound doctrines which have remained sound, and may be even more relevant in today's commercial market. The arguments raised by Petitioner, and the Solicitor General in support of Petitioner's position, are, for the most part, based upon assumptions and neglect to recognize rules of law established as valid at the time of the *Minturn* ruling, which have remained valid to this day. In addition, Petitioner has failed to provide any supportable reason for overturning the District Court's finding that its contract was a preliminary non-maritime contract, with no juridical connection with the navigation of a vessel or direct involvement with maritime commerce.

In plain and unambiguous language, the Court in *Minturn* found a general agency contract not to be in the nature of a

maritime contract and thus not within the Court's admiralty jurisdiction. In an attempt to persuade this Court to overrule this finding, Petitioner and the Solicitor General discuss antiquated theories of maritime law, which they posit "may have" influenced the *Minturn* Court. Many of these antiquated theories were, at the time of the *Minturn* decision, already abandoned, yet Petitioner assumes that they influenced the *Minturn* decision. More logically, the *Minturn* decision was the product of the accepted doctrine that contracts preliminary to maritime contracts were not within admiralty jurisdiction, as well as the recognized presumption that a general agent, due to the nature of his relationship with the owner, relied upon the credit of that owner. Courts that have interpreted the *Minturn* doctrine over the past 135 years have confirmed this provenance and have applied it uniformly to general agency contracts. Petitioner has provided no viable reason to overturn these principles.

It is argued that, in recent years, a few courts and commentators have questioned the vitality of the *Minturn* and preliminary contract doctrines. An analysis of representative decisions in the Circuits reveals, contrary to Petitioner's contention, that there is virtual uniformity as to the continuing applicability of both the *Minturn* general agency doctrine and the preliminary contract doctrine. Those few Circuits which have carved out exceptions have limited them to agents directly involved in the operation of vessels. Rather than overturning *Minturn* and the preliminary contract doctrine, affirmance would achieve the result sought by the Solicitor General, a rationalization and continuity in admiralty jurisdiction, as well as elimination of any confusion as to the viability and meaning of *Minturn*. To do otherwise would create confusion, burdening the courts with disputes on contracts currently recognized as being outside admiralty jurisdiction.

If there is any doubt as to the vitality of the *Minturn* rule, the proper forum to address the issue is Congress. Since 1910, whenever problems regarding maritime liens have arisen, Congress has addressed them and, whenever deemed necessary, solved them by amendment to the FMLA. Each time Congress has addressed maritime liens, it has categori-

cally stated that it had no intention of changing the substantive law (other than those changes expressly made). Since 1854, the substantive law of this nation has included the *Minturn* and preliminary contract doctrines. Congress has not seen either doctrine as a problem to be addressed. It would be only logical to affirm these doctrines and leave to Congress any attempts to change them.

Petitioner's frustration with the applicability of the *Minturn* and preliminary contract doctrines to its contract does not justify judicial abandonment of those long-recognized rules of law, especially in view of Congress' silence in an area where it has affirmatively acted. Exxon should not look to this Court to protect it from what, in essence, was a bad business decision. The Judgment below should be affirmed.

I.

CONGRESS HAS SHOWN NO INTENT TO GRANT AGENTS A LIEN UNDER THE FMLA.

This Court should not, at this juncture, disturb the existing precedents and extend the reach of maritime law further than Congress has approved. Claims like those asserted by Exxon are best presented in the legislative forum. If Congress feels that denying general agents recourse to the admiralty jurisdiction of Federal courts is intolerable, it has ample power to enact a suitable solution. Congress not having done so, this Court should proceed with caution in construing statutory provisions. *Victory Carriers, Inc. v. Law*, 404 U.S. 202 (1971).

Article III, § 2, cl. 1, of the Constitution is the source of jurisdiction in litigation predicated upon Federal maritime law. Article III impliedly: (1) grants Congress the power to confer admiralty and maritime jurisdiction on the "Tribunals inferior to the Supreme Court"; (2) empowers Federal Courts to exercise the admiralty and maritime jurisdictions to continue to develop the substantive admiralty law within constitutional limits; and (3) empowers Congress to revise and supplement the maritime law within the limits of the Consti-

tution. *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 360-361 (1958).

Exercising its constitutional grant, Congress enacted the Federal Maritime Lien Act, 46 U.S.C. §§ 971-973, granting a lien to repair and supplymen for services rendered to vessels. This Act, first enacted in 1910, has been amended three times; in 1920, 1971 and 1988. Congress, having considered the area four times, has declined to expand admiralty jurisdiction to include general agents in the Act's list of intended beneficiaries. The Act's legislative history evidences no intent to expand maritime jurisdiction beyond the specific inclusion of towage services, which was accomplished in 1920. Where Congress, which must be presumed to be aware of existing law when it passes legislation, sets certain limits on admiralty jurisdiction, ". . . an admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation." *Miles v. Apex Marine Corp.*, 498 U.S. ____, 111 S. Ct. 317 (1990); *Mobil Oil Corp. v. Higginbotham Adm'x*, 436 U.S. 618 (1978). Congress' virtual preemption of this field is demonstrated by the variety of legislative enactments since 1884.[2]

The FMLA was intended to protect those suppliers of repairs, towage and other necessaries, who were unable to protect themselves properly, with the security of a lien on a vessel. Section 971 of the FMLA reads as follows:

> Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel. 46 U.S.C. § 971 (1982)

2 Rather than reiterate a listing of Congressional maritime legislation, this Court is referred to the representative sampling contained in the Solicitor General's brief at n. 15, at 22-23.

For an understanding of Congress' intent when enacting the FMLA in 1910 and the subsequent amendments of 1920, 1971 and 1988, a review of the events and case law from which the Act evolved is essential.

(A) Developments Leading to the 1910 FMLA.

[1] Early American Admiralty Jurisdiction.

Admiralty courts in this country can be traced to the beginning of the sixteenth century when local courts were dominated by colonial governors. By commission of the English High Court of Admiralty of 1691, governors were instructed to establish courts of admiralty "for the hearing and determining of all marine and other causes and matters proper to be heard therein." D. Robinson, *Admiralty and Federalism*, 70 (1970). These vice-admiralty tribunals assumed a broad jurisdiction, to the extent that the writs of prohibition of the High Court of Admiralty in England allowed, D. Robinson, *supra*, at 93. It is questionable, however, whether the jurisdiction exercised by these courts was as broad as described by Justice Story in *De Lovio v. Boit*, 7 F. Cas. 418 (C.C.D. Mass. 1815) (No. 3,776):

> The commissions of the crown gave the courts, which were established, a most ample jurisdiction over all maritime contracts, and over torts and injuries, as well as in ports as upon the high seas. [Footnote omitted.] And acts of parliament enlarged, or rather recognised, this jurisdiction by giving or confirming cognizance of all seizures for contraventions of the revenue laws. The Fabius, 2 C. Rob. Adm. 245. Tested, therefore, by this exposition, the admiralty jurisdiction of the United States would be as large, as its most strenuous advocates ever contended for. *Id.* at 442.

In reality, the admiralty jurisdiction of these courts was limited because they were still controlled by the restraining statutes of Richard II and their commissions, copied from the restrictive commissions to the English Courts, D. Robinson,

supra, at 67, 76-79, 93; T. Schoenbaum, *Admiralty and Maritime Law*, §§ 1-6 (1987).

Upon this country's independence, Article III, Section 2, Clause 1 of the Constitution granted Congress the power to confer to those courts inferior to the Supreme Court "all cases of admiralty and maritime jurisdiction," which power Congress exercised in 1789 through Section 9 of the Judiciary Act, ch. 20, 1 Stat. 76, now 28 U.S.C. § 1333 (1964).

In defining admiralty jurisdiction over contracts, early American courts emphasized the substance and character of the contract or service, over the location where the contract was entered, thus departing from the English "tidewater" and "body of the county" doctrines.

At the end of the nineteenth century, it was settled that the test in matters of contract depended entirely upon the nature of the transaction, R. Hughes, *Admiralty Law*, (1901) at 17. The Court in *Insurance Company v. Dunham*, 78 U.S. (11 Wall.) 1 (1870), while following Justice Story's characterization of admiralty jurisdiction in *De Lovio v. Boit*, *supra*, reaffirmed this rule by holding:

> It thus appears that in each case the decision of the court and the reasoning on which it was founded have been based upon the fundamental inquiry whether the contract was or was not a *maritime contract*. If it was, the jurisdiction was asserted; if it was not, the jurisdiction was denied. And whether maritime or not maritime depended, not on the place where the contract was made, but on the *subject-matter* of the contract. If that was maritime the contract was maritime. This may be regarded as the established doctrine of the court. *Id.* at 29.) (Emphasis supplied.)

[2] Home Port Doctrine.

In an attempt to mark the periphery of maritime jurisdiction, the Court, in *The GENERAL SMITH*, 17 U.S. (4 Wheat.) 438 (1819), established the so-called "Home Port"

doctrine[3]. In this case, Justice Story held that the general maritime law afforded a lien to a party making repairs and furnishing necessaries to a vessel in a foreign port, but denied such lien protection when services were rendered in the port or state in which the vessel belonged. In the home port, the municipal laws had the power to confer a lien to supplymen for a home port vessel. The reasoning behind the "home port" rule was explained by the Court, in *The ST. JAGO DE CUBA*, 22 U.S. (9 Wheat.) 409 (1824), to be that when supplies are furnished and services are rendered in the home port, the owner is present and there is no need to pledge the credit of the vessel.

As a result of this artificial distinction between materialmen relying on the credit of the owner in the home port and the credit of the vessel in foreign ports, state legislatures moved quickly, creating liens enforceable *in rem* against domestic vessels for the breach of supply or repair contracts.[4]

Since state statutes could grant a lien for claims against a vessel whose home port was within the state, as long as the services rendered were based on a maritime contract, there resulted substantial confusion. *The ENERGIA*, 124 F. 842 (N.D. Wash. 1903); Smith, *The Confusion in the Law Relating to Materialmen's Liens on Vessels*, 21 Harv. Law Rev. 332, 343 (1908).

In an early attempt to give guidance to the courts, the Court, in 1844, exercised its recently granted power to prescribe rules of practice in admiralty[5] by issuing its Admiralty Rule 12, governing claims brought by materialmen for supplies, repairs and other necessaries, allowing either *in rem* or *in personam* actions. Sup. Ct. Adm. R. 12, 44 U.S. (3 How.) xi (1845).

Admiralty Rule 12 was more limited in scope than the rule established in *The GENERAL SMITH*, *supra*, in that it

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3 The home port rule, contained in dicta in *The GENERAL SMITH*, *supra*, was affirmed by the Court in *The PLANTER*, 32 U.S. (7 Pet.) 324 (1833).

4 S. Rep. No. 831, 61st Cong., 2d Sess. at 5 (1910).

5 Act of August 23, 1842, ch. 188, 5 Stat. 516.

referred only to those necessaries supplied by materialmen. When first issued in 1844, Rule 12 gave materialmen supplying or repairing a foreign vessel an action against the vessel *in rem*, or against the owner *in personam*. For claims arising out of services rendered to home port vessels, the materialmen were given an *in rem* action if such was provided by local statute. In 1859, the Court, in an attempt to put an end to the wide diversity of state created *in rem* liens, amended Rule 12 and gave materialmen who serviced home port vessels an action *in personam* only, thus taking away the right to proceed *in rem*, even if state statutes so provided.[6]

In 1872, the Supreme Court amended Rule 12 again, restoring the materialmen's right to proceed *in rem*. This final version of the rule read as follows:

> In all suits by material-men for supplies or repairs, or other necessaries, the libellant may proceed against the ship and freight *in rem*, or against the master or owner alone *in personam*. Sup. Ct. Adm. R. 12, 80 U.S. (13 Wall.) xiv (1872).

The reason for this 1872 amendment is explained in *The LOTTAWANNA*, 88 U.S. (21 Wall.) 558 (1874):

> As to the recent change in the admiralty rule referred to, it is sufficient to say, that it was simply intended to remove all obstructions and embarrassments in the way of instituting proceedings *in rem* in all cases where liens exist by law, and not to create any new lien, which, of course, this court could not do in any event, since a lien is a right of property, and not a mere matter of procedure. *Id.* at 579.

[3] Congressional Intent Upon Enactment of the 1910 FMLA.

In 1910, Congress responded to calls from the judiciary to adopt a uniform Federal law regulating the myriad of liens

6 Sup. Ct. Adm. R. 12, 62 U.S. (21 How.) iv (1859).

created by state statute.[7] In *The LOTTAWANNA*, *supra*, the Court stated:

> It would undoubtedly be far more satisfactory to have a uniform law regulating such liens, but until such a law be adopted (supposing Congress to have the power) the authority of the States to legislate on the subject seems to be conceded by the uniform course of decisions. *Id.* at 581.

Similarly Justice Hammond in *The RAPID TRANSIT*, 11 F. 322 (W.D. Tenn. 1882), when questioning the results of the home port rule, lamented:

> I would gladly see the ancient law of the sea, that gave a lien irrespective of "home" or "foreign" ports, restored; but the power to do this is not with the courts, and the incongruities of our existing laws must be endured till congress acts. *Id.* at 330.

A proposed bill entitled, "An Act Relating to liens on vessels for repairs, supplies, or other necessaries" was drafted by a committee of the Maritime Law Association of the United States ("MLA")[8], adopted by that association and recommended by the American Bar Association. Why the FMLA was enacted and what Congress's intent was in doing so, is clearly stated in two Senate reports[9], a House Report[10], and a letter from the MLA outlining the "purpose of the bill and the circumstances which demand this legislation"[11] included in its entirety in the Senate's report.

7 Smith, *The Confusion in the Law Relating to Materialmen's liens on Vessels*, *supra*, 351-352 (1908); R. Hughes, *Admiralty Law*, 102 (1901).

8 Described in the S. Rep. No. 831, 61st Cong., 2d Sess. 5 (1910), as: "an organization composed of lawyers and other persons interested in maritime questions, including some of the federal judges."

9 S. Rep. No. 690, 61st Cong., 2d Sess. (1910); S. Rep. No. 831, 61st Cong., 2d Sess. (1910).

10 H. R. Report No. 772, 61st Cong., 2d Sess. (1910).

11 S. Rep. No. 831, 61st Cong., 2d Sess. 2 (1910).

The bill contained five sections which were, with one slight amendment, passed by Congress in 1910, Act of June 23, 1910, ch. 373, § 1, 36 Stat. 604. As pointed out by Fitz-Henry Smith, Jr., one of its drafters,[12] the bill (1) did away with the artificial home port doctrine by no longer distinguishing between foreign and domestic vessels, thus rejecting the holding in *The GENERAL SMITH*, *supra*, (Section 1); (2) removed the presumption of credit extended to the owner, (Section 1 and 4); and (3) superseded the state statutes insofar as they conferred *in rem* liens for supplies, repairs and other necessaries (Section 5).

The Senate Report described the purpose of the bill as follows:

> This bill relates to liens on vessels for repairs, supplies, or other necessaries, and is designed to remove the confusion now existing in an important branch of the admiralty jurisprudence of the United States by simplifying the law and making it uniform throughout the country. *It makes no change in the general principles of the present law of maritime liens, but merely substitutes a single statute for the conflicting state statutes.*" (Emphasis added.) S. Rep. No. 690 (1910), incorporated in S. Rep. No. 831, 61 Cong., 2d Sess. 1-2 (1910).

The statute's purpose was also voiced in the MLA letter incorporated and adopted verbatim by the Senate in its Report.

> It [the legislation] makes no change in the general principles of the present law of maritime liens, but merely substitutes a single statute for the conflicting state statutes; . . . S. Rep. No. 831, 61 Cong., 2d Sess. 4 (1910).

Recognizing that the situation might arise whereby under the then existing legal principles, some creditors were not entitled to a lien on a vessel for services considered non-maritime, Congress specifically preserved the right to

12 Smith, *The New Federal Statute Relating to Liens on Vessels*, 24 Har. L. Rev. 182, at 187-188, 190 (1911); other members of the MLA Committee which drafted the bill were: Judge Frederic Dodge and Mr. Robert Hughes.

common-law remedies in Section 4 of the Act. Moreover, the MLA letter specifically referred to the fact that ". . . in providing that the right of action secured under state statutes against vessels shall be superseded, the general provision saving common-law remedies even for admiralty causes is not affected."

The only change made by the Senate in the proposed bill was the adding of the words "to be enforced by proceedings *in rem*" to Section 5, thus eliminating the possibility that:

> . . . the Act might be construed to prevent the attachment of a vessel in a suit against the owner in a state court. Needless to say it was not intended that the Act should have this effect, and it is believed that the section in question could not be construed to have any such effect. Smith, *The New Federal Statute Relating to Liens on Vessels*, 24 Har. Law Rev. at 188 (1911).

Admiralty jurisdiction, as it existed in 1910, did not include a claim arising out of the contract for services rendered and funds advanced by a general agent, *Minturn v. Maynard*, *supra*; *Diefenthal v. Hamburg-Amerikanische Packetfahrt Actien-Gesellschaft*, 46 F. 397 (E.D. La. 1891), *appeal dismissed*, 159 U.S. 251 (1894); *White v. Two Hundred and Ninety-Two Thousand Three Hundred Dollars*, 19 F. 848 (E.D.N.Y. 1883). Congress did not express any intention to change this accepted rule of law.

(B) The 1920 Amendment to the FMLA

[1] Developments Leading to the FMLA 1920 Amendment.

Because the 1910 FMLA did not change the existing maritime law and did not entirely repeal state statutes, there remained at least three sources that could confer a lien to materialmen for the supply of goods and services necessary to the operation of a vessel; (1) the FMLA; (2) general maritime law; or (3) state lien statutes to the extent they were not in conflict with the FMLA. G. Gilmore & C. Black, *The Law of Admiralty* (2d ed. 1975), § 9-24.

As a result of the broadening of the original Act by the amendment of 1920, state statutes lost most of their importance and the Federal law was looked upon as the principal source of law for maritime contract liens. By amendment of 1920, Congress added the word "towage" to Section 1 and moved the words "other necessaries" to be read after the phrase "use of drydock or marine railway."[13] Courts took this amendment as a justification to broadly interpret the statute and construe the term "other necessaries" by analogy to include services not specified in the Act. It is doubtful, however, that the 1920 amendment should be taken as a sign of Congressional intent to expand the field of maritime liens, since the inclusion of "towage" appears to be the result of Congress' inadvertent exclusion of those services in 1910. Moreover, there is nothing in the legislative history that attaches any significance to the move of the words "other necessaries." Mattis, *Maritime Liens for "Necessaries": A Tale of Statutory Misinterpretation*, Vol. 21, No. 3, J. Mar. L. Com. 358, 359 (1990).

As pointed out in *The J. DOHERTY*, 207 F. 997 (S.D.N.Y. 1913), the Committee for the House of Representatives considered the inclusion of towage in Section 1 in 1910. This proposal was rejected however ". . . as being something foreign to the subject matter of the Act." *Id.* at 1000. Similarly, the Senate members suggested that a statement be included in their report to the effect that "towage" was covered under "necessaries." *Id.* at 1000. For reasons unknown, such statement was never included.

Following Congress' failure to include towage services in the 1910 FMLA, courts denied a lien for such services rendered. *The MONA*, 282 F. 468 (4th Cir. 1922) (decided under 1910 Act); *W. G. Coyle & Co. v. North America S.S. Corp*, 262 F. 250 (5th Cir. 1920); *The HATTERAS*, 255 F. 518 (2d Cir. 1918); *The J. DOHERTY*, *supra*.

Congress, reacting to these decisions, by amendment of 1920, Act of June 5, 1920, ch. 250, subsection P-T, 41 Stat. 1005, added towage to the list of expressly named items for

13 46 U.S.C. § 971 (1982).

which a maritime lien could be granted. The amended Act was codified as part of the Merchant Marine Act in 46 U.S.C. §§ 971-75.

[2] Congressional Intent When Amending the FMLA in 1920

Legislative history in connection with the 1920 amendment is scarce. The Congressional Record reports:

> The Senate amendment also reenacts the maritime lien Act of 1910 with the additional grant of a lien for towage in the home port of a vessel and the declaration that towage shall be presumed to be furnished upon the credit of the vessel.
>
> . . . prevents the repeal of section 4 of the maritime lien Act of 1910 in respect to the doctrines of advances and laches. Mattis, *Maritime Liens for Necessaries*, Vol 21, No. 3, J. Mar. L. Com. at 359.

The only other guidance is given by the repealing clause contained in Subsection X of the Merchant Marine Act, which provided:

> The Act entitled "An Act relating to liens for repairs, supplies, or other necessaries," approved June 23, 1910, repealed. This section, however, so far as not inconsistent with any of the provisions so repealed, shall be held a reenactment of such repealed law, and any right or obligation based upon any provision of such law and occurring prior to such repeal, may be prosecuted in the same manner and to the same effect as if the act had not been passed. Act of June 5, 1920, ch. 250, § 30, Subsection X, 41 Stat. 1005.

The lack of detailed legislative history emphasizes Congress' intent to make only a limited correctional, albeit substantive, change in the Act by adding towage services. The "most important thing about the legislative history of the 1920 Act was not what it said, but what it did not say. It did not say

there was to be any major substantive change in the law." *Mattis, Maritime Liens for "Necessaries", Id.* at 361.

The Court, in 1920, when summarizing the congressional purpose underlying the 1910 FMLA, declared that:

> The [Senate] reports expressly declare that the bill makes "no change in the general principles of the present law of maritime liens, but merely substitutes a single statute for conflicting state statutes." *Piedmont & Georges Creek Coal Co. v. Seaboard Fisheries Co.*, 254 U.S. 1 (1920) at 11, 12.

The 1920 amendment caused the Act to, in large part, pre-empt state statutes and become the main source for maritime liens. There was no doubt that the FMLA had, in great part, achieved its purpose of simplifying the law.

Reviewing the then recently amended lien Act of 1920, John W. Griffin in *The Federal Maritime Lien Act*, 37 Harv. L. Rev. 15 (1924) at 23, summarized those contracts that were considered maritime at that time and stated that a general agent who advances money to a vessel, was not entitled to a maritime lien under either general maritime law or the Act.

Congress, in 1920, could have conferred a maritime lien for services rendered by general agents, but made no attempt to do so. Although the 1910 FMLA and the 1920 amendment seem to tip the balance on the scale of protection in favor of the materialmen, the statute did not affect the requirement, as established by *Minturn*, that a claim be in the nature of a maritime contract, which a general agency contract was not.

(C) The 1971 Amendment to the FMLA

[1] Developments Leading to the 1971 Amendment of the FMLA

The judicial application of the FMLA between 1920 and 1971 shows a trend of interpreting "necessaries" by analogy rather than *stricti juris*. Courts interpreted the Act to include, e.g., stevedoring liens, *The HENRY S. GROVE*, 285 F. 60 (W.D. Wash. 1922), *aff'd* on other grounds *sub nom. North*

Coast Stevedoring Co. v. United States, 17 F.2d 874 (9th Cir. 1927); and *Grays Harbor Stevedore Co. v. United States*, 298 F. 159 (D. Md. 1924); a lien for wharfage, *The LITTLE CHARLEY*, 31 F.2d 120 (D. Md. 1929); a lien for canal fees, *In re Burton S.S. Co.*, 3 F.2d 1015 (D. Mass. 1925); and a lien for winter storage of a racing yacht, *The ARTEMIS*, 53 F.2d 672 (S.D.N.Y. 1931).

By expanding the categories of "necessaries", the lower courts failed to follow the repeated warning of the Court to interpret "necessaries" *stricti juris*. See, *Osaka Shosen Kaisha v. Pacific Export Lumber Co.*, 260 U.S. 490 (1923); *Vandewater v. Mills*, 60 U.S. (19 How.) 82 (1856). The Court has cautioned lower courts not to extend maritime liens by analogy, because they would thus create exceptions to the rule that all creditors have equal rights in the property of their debtor, an admonition which was followed in *The KIERSAGE*, 14 F. Cas. 466 (C.C.D. Me. 1855) (No. 7,762):

> Even when the court may be of opinion, that the law might be beneficially extended to include cases not described in its terms, it must be left to the legislative power to so extend it. *Id.* at 467.

Three years after writing the opinion on *Minturn*, Justice Grier, in *Vandewater v. Mills*, *supra*, reaffirmed the *stricti juris* doctrine, stating that a maritime lien is a privilege and, therefore, *stricti juris* and cannot be extended by construction, analogy or inference. The Court repeated this rule of construction in 1923, after the 1910 FMLA enactment and 1920 amendment, in *Osaka Shosen Kaisha*, *supra*. By not adhering to the Court's admonitions, lower courts have expanded the supplier's right to a maritime lien for "necessaries" beyond those privileges granted by Congress. As a result of the lack of due deference given to the will of the legislature and the will of the Court, courts have increased the number of liens, thus depleting the funds Congress had intended for those creditors specifically enumerated in the FMLA.

If Congress felt that there was reason to adopt the *ejusdem generis* construction of "necessaries," as developed in the

lower courts, they could have done so when amending the Act in 1971. Moreover, if Congress felt the need to create new beneficiaries, such as stevedores or general agents, they could have done so. However Congress only amended § 973 of the FMLA by striking the materialmen's duty to exercise reasonable diligence in determining whether the vessel's charterer had authority to bind the vessel. This change was instigated by the effects of the Court's decision in *Dampskibsselskabet Dannebrog v. Signal Oil & Gas Co.*, 310 U.S. 268 (1940), imposing a duty to inquire into the authority of the person ordering necessaries.

[2] Congressional Intent When Amending the FMLA in 1971

The purpose of the bill to amend the FMLA, as stated by the Committee on Merchant Marine and Fisheries, was:

> . . . to protect terminal operators, ship chandlers, ship repairers, stevedores and other suppliers who in good faith furnish necessaries to a vessel. At the present time, a "prohibition of lien" clause in a charter party and the Ship Mortgage Act preclude a supplier from acquiring a lien on a vessel for necessaries furnished to the vessel. The bill would amend the Ship Mortgage Act to permit a supplier to acquire such a lien despite a "prohibition of lien" clause in the charter party. H.R. Rep. No. 92-340, 92nd Cong., 1st Sess. 1 (1971).

The Committee also clearly stated that:

> Your Committee wishes to emphasize that HR6239 makes *no change in maritime law*, the priority of maritime liens, *or in the accepted definition of necessaries.* (Emphasis supplied.) H.R. Rep. No. 92-340, 92nd Cong., 1st Sess. 3 (1971).

Although the report of the House Committee suggested that stevedore services were included in the Act and the House may have discussed such inclusion, the actual language of the Act does not add these services as a category to be

protected by a lien. Again, Congress specifically modified the Act to correct a problem they felt needed correction, in order to maintain a balance in the materialmen-vessel owner relationship. Congress did not broaden the Act to grant a lien to stevedores. Neither did Congress discuss or consider changing the judicially created rule of *Minturn*, denying a lien to a general agent, notwithstanding the fact that commentators like Gilmore and Black had already voiced their discontent with the *Minturn* holding, G. Gilmore & C. Black, *The Law on Admiralty*, (1st ed. 1957), at 24, n. 88; and notwithstanding the existence of the Fifth Circuit Court of Appeals decision in *Hadjipateras v. Pacifica, S.A.*, 290 F.2d 697 (5th Cir. 1961), seemingly carving out an exception to the *Minturn* holding. See also: Black, *Admiralty Jurisdiction: Critique and Suggestions*, 50 Colum. L. Rev. 259, 274-77 (1950).

(D) 1988 Amendment of the FMLA.

While Petitioner relies on the 1971 version of the FMLA, which was in effect at the time of the Jeddah delivery, it is important to note that Congress, when again amending the FMLA in 1988, did not express any intention of expanding the specific groups of beneficiaries of the Act.

In 1984, the Court of Appeals for the Second Circuit decided *Peralta Shipping Corp. v. Smith & Johnson (Shipping) Corp.*, *supra*, specifically denying a lien to a general agent, thus continuing its "faithful adherence" to the *Minturn* holding. The Court in *Peralta* stated that *Minturn* still remained the well-settled rule excluding general agency contracts from admiralty, notwithstanding the fact that the Ninth Circuit arguably carved an exception to that rule in *Hinkins Steamship Agency v. Freighters, Inc.*, 351 F. Supp. 373 (N.D. Cal. 1972), *aff'd*, 498 F.2d 411 (9th Cir. 1974). The court in *Peralta* invited the Court to consider the general agency rule, an invitation that was declined. However, Justices Blackmun, Brennan and Marshall expressed a desire to examine the issue in light of decisions such as *Hinkins*, *supra*, and *Hadjipateras*, *supra*, and in light of questions raised by commentators. It should be noted that the dissent did not

specifically find the *Minturn* ruling to be "improper," Petitioner's contention to the contrary (Pet. Brief at 12).

In *Hinkins*, *supra*, the services of a husbanding agent, which were performed on one ship in a specific port for one call, with the agents' personnel directly supervising the services and repeatedly being in attendance onboard the vessel, were found not to be preliminary and to fall within the court's admiralty jurisdiction. Earlier, the Court of Appeals for the Fifth Circuit in *Hadjipateras*, *supra*, found a claim under a vessel management agreement to be within its admiralty jurisdiction. By doing so, the court failed to recognize the differences between a vessel management agreement and a general agency agreement, the first allowing for actual physical operation of the vessel and the second being merely preliminary to maritime activity. Nevertheless, *Hadjipateras* was looked upon by the court in *Peralta* as an exception to the general agency rule of *Minturn*. One year before Congress amended the FMLA for the third time, the Eleventh Circuit in *E.S. Binnings, Inc. v. M/V SAUDI RIYADH*, 815 F.2d 660, *reh'g denied*, 820 F.2d 1231 (11th Cir. 1987), discussed the recent, seemingly conflicting holdings in *Hinkins* and *Hadjipateras*, putting both in proper prospective while reaffirming and following the *Peralta* and *Minturn* holdings.

It is appropriate to assume that elective representatives, like other citizens, know the law, *Cannon v. University of Chicago* 441 U.S. 677 (1979), and were aware of the *Peralta*, *Hinkins*, *Hadjipateras*, and *Binnings* decisions. Nevertheless, Congress did not expand the protection of the Act to include general agency contracts as an additional category of beneficiaries. Where, as here, Congress has had a recent opportunity to change the law, taking into account the case law existing at the time the statute was passed, courts should look at such enactment as a policy guideline, *Miles v. Apex Marine Corp.*, *supra*. Where Congress has acted, by defining groups of beneficiaries, only Congress should be the one to add beneficiaries, which in this instance, it did not do.

The 1988 Act is codified as 46 U.S.C. §§ 31301(4), 31307, 31341 and 31342. In Section 31301, "necessaries" are defined to include "repairs, supplies, towage, and the use of a dry

dock or marine railway; . . ." The Committee on Merchant Marine and Fisheries explains that

> . . . nor is it the Committee's intention to effect a substantive change by the failure to use the term "other necessaries" in the new definition. Particular concern was expressed over whether the provision of certain services would qualify for the status of a maritime lien. Again, *the Committee does not intend to make a substantive change* nor in any way alter the meaning of the term "other necessaries" as that term has been interpreted by the courts. (Emphasis added.) H.R. Rep. 100-918, 100th Cong., 2d Sess. 15 (1988).

The clarity of congressional intent was understood by the courts in *Peralta*, *supra*, at 800, n. 2, and *E.S. Binnings*, *supra*, at 666, and the court below (Pet.App. at 282) as being that the Act was not intended to enlarge admiralty jurisdiction to include agency contracts.

During the past eighty-one years, Congress has created the FMLA and amended it three times. Although the holding in the *Minturn* was the established general rule during this entire time (and for 56 years prior thereto), Congress has declined to change this rule of law by means of legislation. Congress cannot be presumed to have expanded the boundaries of the FMLA by its silence. However, such silence may be used to interpret Congressional intent as being to the contrary. As stated in *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979), *reh'g denied*, 444 U.S. 889 (1979), "[t]his silence is most eloquent, for such reticence while contemplating an important and controversial change in existing law is unlikely." *Id.* at 266-267.

Where Congress has acted, either by inclusion or exclusion of a specific group of beneficiaries, under the FMLA, only Congress can change such statute, since the power to assign a contract to either courts in admiralty or state courts, depending on whether that contract has a real and substantial relation to the conduct of the business of navigation and commerce, is left to Congress. See, Black, *Admiralty Juris-*

diction: Critique and Suggestions, 50 Colum. L. Rev. 259, 274 (1950).

II.

THE *MINTURN* DECISION AND ITS CLAIMED ANTECEDENTS.

The court below denied Exxon a lien, finding its services to be preliminary to a maritime contract, following *Peralta* and *Minturn*, where it was held that the services rendered by a general agent are preliminary to a maritime contract and contained nothing in the nature of a maritime contract. The court in *Peralta* described this rule as a "demarcation of ancient vintage" and considered itself supported in reaffirming this well settled rule by the holding in *Minturn*. *Peralta*, *supra*, at 798, 801-802 (1984).

The dispute between Exxon and Central Gulf centers around the status of Exxon when it rendered its services, what the nature of the services were and how they were executed. The court below found that Exxon's services were activities preliminary to the bunkers reaching the vessel, that Exxon's activities ceased prior to the fuel being placed onboard the vessel (Pet.App. A30), and that Exxon's long-standing relationship with Waterman was indicative of Exxon acting as a general agent (Pet.App. A12-A13). The rule of law that preliminary activities are outside of an admiralty courts' jurisdictional grant is rooted in *The THAMES*, 10 F. 848 (S.D.N.Y. 1881) and *Minturn*. In effect, Exxon is petitioning this court to overrule both cases, thus allowing all contracts preliminary to navigation and maritime commerce to come within the admiralty jurisdiction of Federal courts.

The *Minturn* decision is clear and need not be cast in a cloud of presumptive arguments about its provenance. Having available a record detailing the type of services rendered, where they were rendered, what the vessel's home port was, who its owners were and where they resided, setting forth the accounts and detailing libellant's action on a note given by one co-owner for the amount due by that owner in another proceeding, the Court in *Minturn* decided, "[t]here is nothing

in the *nature* of a maritime contract in the case" (emphasis added), and "[t]hat the money advanced and paid for respondent was, in whole or in part, to pay bills due by a steamboat for repairs or supplies, *will not make the transaction maritime*, or give the libellant a remedy in admiralty" (emphasis added), *Minturn* at 477. The brevity of the opinion, if anything, suggests that the question presented to the Court was not overly complicated and that the answer was clear. Emphasizing this point, the Court stated, "[t]he case is too plain for argument." *Id.* at 477.

Pursuant to his agreement with the owners of the Steamer Gold Hunter, Charles Minturn provided and paid for labor used for repairs, services rendered and materials supplied to the vessel. Moreover, Minturn acted as charter broker and arranged the charter of the vessel for a voyage from San Francisco to Oregon. He expended funds for advertisements and collected and disbursed funds for the owners. He was to receive a commission for his services, *Minturn* Record at 3, 4-11, 16-17. In an effort to settle the account with one of the part-owners, Minturn accepted "a draft or bill of exchange" from that one owner for his proportionate share of that debt. When not paid on the draft, Minturn commenced a suit in District Court naming that co-owner only. That action being undetermined, Minturn subsequently commenced an action *in personam* for the full amount due against all ten owners.

Given the foregoing facts and the Court's finding, Petitioner and the Solicitor General make various speculative arguments with respect to notions of admiralty jurisdiction possibly influential in the *Minturn* Court's decision. These arguments, stemming from certain writs of prohibition of English admiralty courts, are either very unlikely to have had any bearing on the decision or were irrelevant to the question raised in *Minturn*. All of them, however, are too speculative and form no basis for reversal or limitation of the *Minturn* decision.

(A) Tidewater Limitation and the Body of the County Doctrine.

Petitioner and the Solicitor General argue that the *Minturn* decision may have been influenced by the jurisdictional principle of the tidewater limitation, as established in *The Steamboat THOMAS JEFFERSON*, 23 U.S. (10 Wheat.) 428 (1825). This doctrine, a heritage of the English writs of prohibition, restricted the jurisdiction of admiralty to those claims arising out of events occurring on waters within the reach of the ebb and flow of the tide. The Court rejected this doctrine in *The Propeller GENESEE CHIEF v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851), three years prior to its ruling in *Minturn*.

As maritime commerce developed, opposition to the tidewater doctrine increased. The Judiciary Act of 1789 granted to the District Courts' admiralty jurisdiction over ". . . waters which . . . are navigable from the sea by vessels of ten or more tons burden, &c, as well as upon the high seas." Justice Grier, in an opinion written three years after *Minturn*, noted that "[b]ut this act [Judiciary Act 1789] does not confine admiralty jurisdiction to tidewaters; and if the flux and reflux of the tide be abandoned, as an arbitrary and false test of a 'navigable river,' it required no further legislation of Congress to extend it to the Mississippi, Alabama, and other great rivers, 'navigable from the sea.' " *Jackson v. The Steamboat MAGNOLIA*, 61 U.S. (20 How.) 296 (1857).[14]

Justice Grier apparently believed that the legislation did not bestow any jurisdictional power on the admiralty courts

14 Justice Grier's remark concerning legislation referred to the Act of 1845, ch. 20, 5 Stat. 726 (1845), pursuant to which Congress extended the courts' admiralty jurisdiction to:

> . . . matters of contract and tort, arising in, upon, or concerning, steamboats and other vessels . . . in business of commerce and navigation between ports and places in different States and Territories upon the lakes and navigable waters connecting said lakes, as is now possessed and exercised by the courts in cases . . . upon the high seas, or tidewaters, . . . 5 Stat. 726 (1845).

that they did not already have, which belief evidences his expansive interpretation of admiralty jurisdiction.

In *Waring v. Clarke*, 46 U.S. (5 How.) 440 (1847), seven years before the *Minturn* decision, the Court rejected application of the English writs of prohibition as a whole to the admiralty jurisdiction of this country's courts, including the "body of the county" limitation. The Court further restated the earlier conclusion of *De Lovio v. Boit*, *supra*, that subject matter, and not locality, determines jurisdiction in cases of contract. *Waring v. Clarke*, *supra*, at 458.

The tidewater doctrine was eventually rejected by the Court in *The Propeller GENESEE CHIEF*, *supra*, involving the question whether admiralty jurisdiction was to extend to all public navigable lakes and waters beyond the reach of the tide. Seven out of the nine justices that sat on *The Propeller GENESEE CHIEF* case, including Justice Grier, were to decide *Minturn* three years later.

Although both the tidewater and body of the county doctrines were rejected by the time the Court considered the question of jurisdiction in *Minturn*, both Petitioner and the Solicitor General maintain that these doctrines influenced the Court, even though the site of the *Minturn* services was the Port of San Francisco, clearly within the reach of the ebb and flow of the tide. We have to presume that the Justices remembered their own decisions on admiralty jurisdiction. No mention was made in *Minturn* which would indicate that the court was dissatisfied with its decisions in *Waring v. Clark* or *The Propeller GENESEE CHIEF*. It is more logical to assume that the recently rejected "body of the county" and "tidewater" limitations on admiralty jurisdiction played no part in the decision making process which lead to the unanimous *Minturn* ruling.[15]

15 Little or no meaning can be derived from the fact that Justice Grier dissented in *Waring*, in light of the fact that he joined in the majority in the *Propeller GENESSEE CHIEF*, a decision which reaffirmed the majority ruling in *Waring* rejecting the body of the county doctrine. It is doubtful that Justice Grier would have been chosen to write the *Minturn* decision if he harbored the doubts Petitioner and the Solicitor General ascribe to him.

(B) Equitable Relief.

It is posited by Petitioner that the *Minturn* Court may have been influenced by the restriction that admiralty courts could not grant equitable relief and that, since the Court held that Minturn's claim was one for accounting, it would not grant such relief in admiralty. While courts in admiralty did not, at that time, have the power to grant equitable relief, they did have the power, once a contract was found to be a maritime contract, to administer relief in accordance with equity and good conscience. As explained by Justice Story, thirty-two years prior to the *Minturn* ruling, in *Andrews v. Essex Fire & Marine Ins. Co.*, 1 F. Cas. 885 (C.C.D. Mass. 1822) (No. 374), at 16-17:

> To be sure in a certain sense, and in the exercise of their general jurisdiction courts of admiralty may be properly said to be courts of equity, that is, courts proceeding *ex equo et bono*, and not confined to the narrow notions of the common law. But courts of admiralty have no general jurisdiction to administer relief as courts of equity.
>
> • • •
>
> They may give the same benefit, as if there was no fraud or mistake, or omission of performance; but this can be in few cases only, which fall, in all their circumstances, completely within their general jurisdiction. Courts of admiralty, in my view, have jurisdiction over maritime contracts when executed, but not over contracts leading to the execution of maritime contracts.
>
> • • •
>
> But if the contract be an executed maritime contract, the jurisdiction attaches; and the admiralty may then administer relief upon that contract according to equity and good conscience.

The admiralty courts' competency to settle matters of account, where the underlying contract was found to be maritime, was also recognized in *Davis v. Child*, 7 F. Cas. 112, 116-117 (D. Me. 1840) (No. 3,628).

Assuming the Court in *Minturn* had held that the services rendered by the agent were maritime, the court could have, according to equity and good conscience, made an accounting of the balance on account.[16] Instead, the Court found that "there was nothing in the nature of a maritime contract" in the agent-owner relationship and, failing to meet this jurisdictional threshold, the proper court to administer relief in a non-maritime claim for accounting was a common law court.

(C) No Jurisdiction in Admiralty Over Claims Between Part-Owners.

Petitioner advances the argument that the *Minturn* Court may have been influenced by the notion that disputes between part-owners are not within admiralty. The validity of this argument is entirely dependent upon Minturn and his principals being co-owners of the vessel Gold Hunter, for which presumption there is no evidence in the record. To the contrary, the Supreme Court record clearly establishes that Minturn was not a part-owner.[17]

Even assuming that Minturn was a part-owner for whom equitable accounting is not available in admiralty courts, the argument does not infringe on the soundness of the *Minturn* holding. While it is correct that no equitable accounting was available to part-owners at the time of *Minturn*, *The Steamboat ORLEANS v. Phoebus*, 36 U.S. (11 Pet.) 175 (1837), this prohibition continued to be the law through the years, *The MARENGO*, 16 F. Cas. 709 (D. Mass. 1866) (No. 9,065), up to the present. *Cal Dive Int'l, Inc. v. M/V TZIMIN (ex STENA SEAHORSE)*, 743 F. Supp. 813 (S.D. Ala. 1990).

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16 Judge Brown reaffirmed this proposition in *Hadjipateras v. Pacifica, S.A.*, 290 F.2d 697, 704-705 (5th Cir. 1961).

17 Note, *General Agency Agreements and Admiralty Jurisdiction*, 17 Conn. L. Rev. 595, 602-603, n. 31, "The libellant, Minturn, was not a co-owner. Supreme Court Record at 3, 58 U.S. (17 How.) 477 (1854)." N. 37: "Such an inquiry would have shown that Minturn was not a part-owner, see *supra* note 31 . . ."

(D) Mutual Exclusivity of Remedies and Lien Requirement for *in personam* Action.

It is argued by Petitioner that the jurisdictional doctrine of mutual exclusivity of admiralty and common law jurisdiction, reminiscent of the English writs of prohibition, may have influenced the *Minturn* court. However, this limitation was rejected by the Court prior to *Minturn*, in *Waring v. Clarke*, *supra*, where it was held, with regard to the "saving to suitors" clause in section nine of the Judiciary Act of 1789, that ". . . its meaning is, that in cases of concurrent jurisdiction in admiralty and common law, the jurisdiction in the latter is not taken away." *Id.* at 460. See, also, *De Lovio v. Boit*, *supra*. If the Court in *Minturn* had agreed with the dissenters in *Waring v. Clarke*, *supra*, arguably, they would have held that Minturn's claim was within admiralty jurisdiction, but that he had asserted that claim in the wrong court. The Court did not state that where a common law remedy existed a claimant could not assert admiralty jurisdiction. Instead, the Court unanimously held that the contract was not a maritime contract and only thereafter suggested that libellant had another remedy. As in *Minturn*, Petitioner is not left without remedy. Exxon, as any other company that arranges supplies to be delivered to a vessel by a third-party, will keep a common law remedy.[18]

Petitioner's proposition that the *Minturn* Court may have been influenced by the notion that no *in personam* lien can be asserted where an *in rem* lien is absent, is based on *Cutler v. Rae*, 48 U.S. (7 How.) 729 (1849), a case involving a claim for general average. As such it is not dispositive of the issue decided in *Minturn*, nor the case at bar.

(E) Home Port Doctrine.

It is Petitioner's contention that the doctrine established in *The GENERAL SMITH*, *supra*, that no maritime lien

18 A remedy which they have pursued, with a significant measure of success, in the Waterman Bankruptcy proceedings, having been compensated for over two-thirds of their claim.

attaches for the furnishing of supplies or repairs at the home port of the vessel, may have influenced the court in *Minturn*. This home port doctrine, however, only comes into play once a court finds that services of a maritime nature have been rendered. Since *Minturn* never passed that threshold, it was unnecessary for the Court to consider *where* the services were rendered. Moreover, if the Court had considered the home port doctrine, in deciding *Minturn*, it seems more likely that it would have made specific reference to the doctrine, as it did in contemporaneous cases. See, *The KALORAMA*, 77 U.S. (10 Wall.) 204 (1869);[19] *The LULU*, 77 U.S. (10 Wall.) 192 (1869).

(F) Narrow View of Maritime Contracts.

Contrary to the supposition of the Petitioner and the Solicitor General, at the time *Minturn* was decided the Supreme Court had already expressed the view that ". . . it was affirmed that the subject matter, and not locality, determined the jurisdiction in cases of contract" and that "[i]t was only upon the principle that the subject matter in cases of contract determined the jurisdiction, that this court decided the cases of *The AURORA*, 1 Wheat., 96, *The GENERAL SMITH*, 4 Id., 438, and *The ST. JAGO DE CUBA*, 9 Id., 409." *Waring v. Clarke*, *supra*, at 458-459 (1847). The groundwork for this conceptual rather than spatial notion of maritime contract jurisdiction was laid in 1815 by Judge Story in *De Lovio v. Boit*, *supra*, at 444, who considered maritime jurisdiction to extend to "all contracts (wheresoever they may be made or executed, or whatsoever may be the form of the stipulations), which relate to the navigation, business, or commerce of the sea."

19 This case, cited by Petitioner in support of its position, is, in fact, of little precedental value. It has never been cited by the courts or the commentators as being in derogation of the preliminary contract or *Minturn* rules, and, by its own terms, is applicable only to situations where there is sufficient affirmative evidence of a common intent on the part of the owner and agent to deal exclusively on the credit of a specific vessel. *The ALLIANCA*, 63 F. 726 (S.D.N.Y. 1894). No such affirmative evidence has been proffered in the case at bar. As such, *KALORAMA*, *supra*, is inapposite.

This "subject matter" test has been followed recently in *Kossick v. United Fruit Co.*, 365 U.S. 731, *reh'g denied*, 366 U.S. 941 (1961), and *CTI-Container Leasing Corp. v. Oceanic Operations Corp.*, 682 F.2d 377 (2d Cir. 1982).

The subject matter test, well developed at the time of the *Minturn* decision, would logically have influenced the *Minturn* Court's determination of whether libellant's services were rendered pursuant to a maritime contract, rather than the locality test. While we do not know what was in the *Minturn* Court's mind at the time of the decision, the result, when applying the subject matter test is the same as would have been reached applying the locality test; under both tests the services were preliminary to maritime commerce and navigation. This is equally true in the case at bar.

(G) Jurisdiction Dependent on Surrender of Note.

Again, Petitioner advances the speculative argument that the fact that Minturn did not surrender a bill of exchange may have influenced the Court in denying maritime jurisdiction. The record, however, shows that the arrangement by which Minturn received a bill of exchange was between Minturn and co-owner Grant only (Supreme Court Record at 22, 2310). The common law action commenced by Minturn on that note named Grant as the sole defendant and was limited to the balance due by him. The action commenced by Minturn in admiralty named all ten co-owners as defendants. While the failure to surrender the note could have influenced the Court with respect to libellant's action against defendant Grant, for his proportionate share, it should have had no bearing on the action against the remaining nine owners.

III.

THE COURTS' APPROACH TO GENERAL AGENCY CONTRACTS AFTER *MINTURN*.

The propositions advanced by Petitioner, and partly joined by the Solicitor General, ask this Court to venture on a search for the, supposedly existing, hidden reasons behind the

Minturn decision. Instead of dissecting this decision, it is far more relevant to determine how the courts, after *Minturn*, have interpreted its holding and how its legal premise was used and developed by the courts. A review of relevant cases that either directly relied upon the *Minturn* holding or that have applied the rule of law that a general agency agreement is preliminary to a maritime contract shows that, with the exception of the Fifth and Ninth Circuit, which have carved out exceptions for those agents directly involved with the operation of the vessel, all Circuits addressing the question are in agreement with and have followed the established rule that general agents do not need the extra protection of a maritime lien. This review is indicative of the strong support for the continued viability of the *Minturn* ruling and exclusion of general agency contracts from admiralty jurisdiction in the Circuits.

(A) The General Agency Rule in the Circuits.

[1] The First Circuit.

In *The M. VIVIAN PIERCE*, 48 F.2d 644 (D. Mass. 1931) a managing agent of a steamship company advanced funds for the payment of the crew's wages. The court found that "[t]he established rule is that a general agent does not have a maritime lien for advances which he makes on behalf of vessels belonging to his principal during his agency," *Id.* at 645., and accepted as the reasoning behind this rule that ". . . the presumption that in such [general agency] cases the advance or the payment is made on the credit of the owner, not of the vessel." *Id.* at 645.

More recently, the First Circuit in *Medina v. Marvirazon Compania Naviera, S.A.*, 709 F.2d 124 (1st Cir. 1983), denied a lien to a managing agent who advanced funds to pay wages of the crew and stated that the law was well settled in that one who advances funds used to discharge seamen's wage liens is subrogated to the lienor's rights, with the exception of "owners, general agents, and, in limited circumstances, shareholders or officers of a corporate owner . . ." *Id.* at 125. See also, *Inversiones Calmar, S.A. v. C.E. Heath*

& Co., 681 F. Supp. 100, 104 (D.P.R. 1988) ("The plain rule of *Minturn v. Maynard* [citation omitted], reiterated in *Kossick*, 365 U.S. 731, 81 S. Ct. 886 is that preliminary contracts are not maritime").

[2] The Second Circuit.

The Second Circuit's leading cases on the issue of services preliminary to maritime contracts are the case at bar and *Peralta Shipping Corp. v. Smith & Johnson (Shipping) Corp.*, *supra*. In *Peralta*, the Second Circuit was asked to abandon "the long standing rule that suits upon general agency contracts are not within the jurisdiction of the silver oar," *Id.* at 798-799, which exception the Court refused to discard, notwithstanding their questioning its continued necessity.

In *Peralta*, plaintiff was hired as a husbanding agent for several vessels calling on various ports, and arranged for the delivery of fuel, water, provisions, repairs, custom clearance and stevedoring. In doing so, the agent advanced certain funds, which remained outstanding and for which balance they sought an accounting.

Recognizing that special deference should be given to prior rulings, the court recited the rule of law distinguishing between preliminary services leading to a maritime contract and such contracts themselves, as set forth in *The THAMES*, 10 F. 848 (S.D.N.Y. 1881).[20] The court then confirmed that the general agency exclusion of *Minturn* agreed with the preliminary services rule. The court noted the faithful adherence of the Second Circuit to the *Minturn* holding in prior cases, citing *Cory Bros. & Co. v. United States*, 51 F.2d 1010 (2d Cir. 1931) and *Admiral Oriental Line v. United States*, 86 F.2d 201 (2d Cir. 1936), modified in other reports *sub nom.*, *Admiral Oriental Line v. Atlantic Gulf & Oriental S.S. Co.*,

20 This preliminary services doctrine did not originate with *The THAMES*, *supra*, but had antecedents dating back, at least, to 1822. *Andrews v. Essex Fire & Marine Ins. Co.*, *supra*, at 16. ("Courts of admiralty . . . have jurisdiction over maritime contracts when executed, but not over contracts leading to the execution of maritime contracts.")

88 F.2d 26 (2d Cir. 1937) (denying a maritime lien to a ship's agent who advanced funds in defense of an action by a third-party against the owners).

It is said that the Court of Appeals in *Cory Bros. & Co. v. United States*, *supra*, for the first time intertwined the general agency doctrine with the preliminary contract doctrine. In doing so, the court cited the seminal language in *The THAMES*, *supra*, calling for the exclusion of preliminary contracts from maritime jurisdiction and stated, "[a]pparently the same ground explains the decision in *Minturn v. Maynard* [cite omitted]" and that, "[i]t is difficult, if not impossible, to distinguish *Minturn v. Maynard* from the case at bar, and that decision would seem to be a controlling authority against admiralty jurisdiction of the present suit." *Id.* at 1012.

That the general agency exclusion follows from the doctrine that preliminary contracts are not within maritime jurisdiction, was followed in *Ingersoll Milling Machine Co. v. M/V BODENA*, 829 F.2d 293 (2d Cir. 1987), *cert. denied*, 484 U.S. 1042 (1988), and by the District Court in the case at bar, where the general agency rule was referred to as a "subset" of the preliminary contract rule (Pet.App. A16). In the case at bar, following *Peralta*, the court described the scope of the *Peralta* rule as limited to the proposition that preliminary contracts, in particular general agency contracts, are outside the limits of admiralty jurisdiction (Pet.App. A32). The court held that a "continuing relationship is particularly significant in maritime law, since a business relationship of substantial duration suggests an absence of reliance on the vessel's credit . . ." (Pet.App. A12) and recognized the fact that Exxon was Waterman's sole procurer of bunkers for forty years.

[3] The Third Circuit.

The Court of Appeals for the Third Circuit, in the *The MARET*, 145 F.2d 431 (3d Cir. 1944), was asked to consider the claim of a general agent who arranged for and advanced funds for supplies delivered to the vessel in one particular

port. With respect to the advances of the agent to a local supplier, the court held that:

> . . . it is clear that Amtorg was purporting to act as the general agent for the Maret under the direction of Sovfracht. The Maritime Lien Acts did not change the general maritime law. . . . It has been repeatedly held that a general agent cannot obtain a maritime lien. [Citations omitted.] *Id.* at 443.

More recently, the Third Circuit in *Bermuda Express, N.V. v. M/V LITSA (ex. LAURIE U)*, 872 F.2d 554 (3d Cir. 1989), demonstrated again that it was in line with the other Circuits with respect to the preliminary services rule.

[4] The Fourth Circuit.

Shortly after the passage of the 1910 FMLA and the 1920 amendment, the Court of Appeals for the Fourth Circuit was presented with the question of whether a "general agent, as such, in the admiralty, [has] the right to a lien for payments made by it in due course of its business?" *The CENTAURUS*, 291 F. 751 (4th Cir. 1923). In this case, an agent had advanced payment for supplies, provisions, fuel and stores it had caused to be furnished to The CENTAURUS as well as for a large number of other vessels owned by its principal. The court held the agent to be a general agent and answered the above question in the negative:

> The general rule that such lien does not exist under the laws of the United States is too well settled to admit to serious controversy. A case may be found here and there to give color to this contention, but the great weight of authority is to the contrary. There are no facts here taking the case out of the general rule. *Minturn v. Maynard. et al.* [citations omitted]. *Id.* at 813.

Moreover, the court noted that the then newly enacted FMLA did not support the agent's claim for a maritime lien. *Id.* at 814. The Fourth Circuit reaffirmed *The CENTAURUS* holding shortly thereafter in *The HOXIE*, 297 F. 189 (4th Cir. 1924).

In 1961, the Fourth Circuit gave a more reasoned explanation, similar to the ones given by other Circuits, as to why general agency contracts were not considered maritime, in *Savas v. Maria Trading Corp.*, 285 F.2d 336 (4th Cir. 1960). The plaintiff in *Savas* was employed with a New York company that acted as general agent for the vessel. Plaintiff was instructed to supervise the repair of the vessel in Bremen, Germany and to do whatever was necessary to have the vessel put in seaworthy condition. The District Court had held that plaintiff was acting as the owner's representative. The Court of Appeals, affirming, explained that although the FMLA provides a lien for those who furnish repairs or supplies to a vessel, the established rule is that a general agent is not entitled to such lien, "the theory being that he acts not as a stranger relying on the security of the vessel but as an agent of the owner to whom he looks for payment [citations omitted]." *Id.* at 339.

Again, this Circuit applied the general agency rule, rooted in *Minturn*, without criticism and confirmed the sound reasoning of the exception.

[5] The Fifth Circuit.

While the Fifth Circuit has recognized a distinction between special and general agents, a distinction rejected in the Second Circuit, they have joined the other Circuits in denying a lien to general agents, on the presumption that general agents are not strangers to the vessel.

In 1932, the Fifth Circuit Court of Appeals, in *Galatis v. Galatis*, 55 F.2d 571 (5th Cir. 1932), restated the established rule that general agents were not entitled to a lien for advances and were bound to look alone to the owners employing them. The Fifth Circuit has continuously adhered to this exclusion of general agency agreements from admiralty jurisdiction, and as recently as 1990, Judge Brown, sitting by designation, denied a claim for advances of funds for land based services rendered to a vessel stating, "[o]wners

(including part-owners and stockholders) are not entitled to a lien for advances, nor is the . . . sort of agent who qualifies as a 'general agent.' " *Cal Dive Int'l, Inc. v. M/V TZIMIN (ex STENA SEAHORSE)*, *supra* at 818.[21]

The Fifth Circuit has, however, developed a distinction between an operating agent and a general agent. In *Hadjipateras v. Pacifica, S.A.*, 290 F.2d 697 (5th Cir. 1961), the Fifth Circuit Court of Appeals affirmed a lower court decision that had held that a dispute arising out of a management contract was within its admiralty jurisdiction. The operating company was to "operate the vessel, obtain freight or freight engagements, collect the freight monies and, after deducting all operating expenses, remit the balance to the owners." Id. at 700.[22]

The Circuit Court found that the purpose of such a management contract was to "effectuate the physical, economic operation and employment of a vessel" (*Id.* at 703), and gave as its "closest example" to the *Hadjipateras* fact pattern *United Fruit Co. v. United States Shipping Bd. Merchant Fleet Corp.*, 42 F.2d 222 (D. Mass. 1930), a case which also involved a vessel management agreement (*Hadjipateras*, *Id.* at 703, n. 14). In *United Fruit*, *supra*, the court explained that the agreement to operate the vessel was similar to a charter party and, therefore, there existed "a direct relation to a ship engaged in commerce on navigable waters." 42 F.2d at 225.

Whereas the Fifth Circuit has continued to distinguish between management agents and general agents on the basis that a management agent is presumed to rely on the credit of the vessel, it continues to recognize that a general agent is presumed to rely solely on the credit of the owner and is not entitled to a lien. See, e.g., *First Nat'l Bank of Jefferson*

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21 Interestingly, Judge Brown quotes Gilmore and Black in support of this proposition, *supra*.

22 Contrary to Petitioner's statement that the agent in *Hadjipateras* and *Minturn* provided the same services, it should be noted that *Minturn* was not a managing agent. In fact, the record in *Minturn* shows that the vessel was engaged by the direction of the owners. *Minturn* Record at 3.

Parish v. M/V LIGHTNING POWER, 851 F.2d 1543 (5th Cir. 1988).

[6] The Sixth Circuit.

The Sixth Circuit, in an early case, conformed to the then settled rule that general agents were not entitled to a maritime lien. In *Dike v. The ST. JOSEPH*, 21 F. Cas. 175 (D.C. Mich. 1869) (No. 12,229), the District Court held that maritime liens take priority over mortgagee's claim, but found that one of the claimants, being part-owner, general agent and superintendent, was not entitled to a maritime lien. Claimant held sixty-thousand dollars worth of stock in the company and was found not to be entitled to any of the proceeds of the sale of the vessel since he was regarded as having given credit to the owners and not to the vessel.

[7] The Seventh, Eighth and Tenth Circuits.

These Circuits appear not to have addressed the issue of a general agent's right to a maritime lien.

[8] The Ninth Circuit.

The Ninth Circuit Court of Appeals recently addressed the issue of jurisdiction of Federal courts in connection with *in rem* actions, in *Melwire Trading Co. v. M/V CAPE ANTIBES*, 811 F.2d 1271 (9th Cir. 1987), where the Court reaffirmed the *stricti juris* doctrine. In so doing, the Circuit Court stated:

> A maritime action *in rem* has traditionally been available only in connection with a maritime lien. Claims not creating a maritime lien must be pursued *in personam*. *The Resolute*, 168 U.S. 437, 440-42, 18 S.Ct. 112, 113-14, 42 L.Ed. 533 (1897). Maritime liens must be construed "*stricti juris*, and cannot be extended by construction, analogy, or inference." *Osaka Shosen Kaisha v. Pacific Export Lumber Co.*, 260 U.S. 490, 499, 43 S.Ct. 172, 174, 67 L.Ed. 364 (1923). Consequently, "[t]he only liens recognized today are those cre-

ated by statute and those historically recognized in maritime law." *In re Admiralty Lines, Ltd.*, 280 F.Supp. 601, 604-05 (E.D.La. 1968), *aff'd mem.*, 410 F.2d 398 (5th Cir. 1969). *Id.* at 1273.

The Ninth Circuit Court of Appeals has, however, granted lien status to a local husbanding agent. *Hinkins Steamship Agency v. Freighters, Inc.*, *supra*. In this case, without using the specific terminology, the Ninth Circuit Court of Appeals seems to have adopted the special versus general agency theory, leaving intact the general premise that where there is a continued relationship between the agent and the principal, the agent's services are presumed to have been rendered on the credit of the owner. The *Hinkins* case involved a local husbanding agent who, upon request of the vessel's managing agent, procured services for and supervised one particular vessel for one call in the port of Baltimore. The services provided included dockage, pilotage, tug assisting, cleaning of fuel tanks and holds and furnishing of supplies, *Hinkins*, 351 F. Supp. at 374. The Court of Appeals distinguished the case from the *Minturn* because *Minturn* ". . . involved general continuing agency agreements," 498 F.2d at 412, whereas the services rendered by the plaintiff were not part of a continuing relationship between Hinkins and the operating agent. Moreover, the facts indicate that Hinkins was a sub-operating agent for that one particular port, vessel and call, and directly supervised and often attended the services rendered. These "distinguishing facts were . . . sufficient to take this contract out of the 'preliminary' or 'shoreside' category and put it within the maritime jurisdiction." 351 F. Supp. at 376. The court's conclusion to grant a lien based on these considerations does not disagree with *Minturn* or with any of the decisions in the other Circuits that are based on the closeness of the relationship between agent and principal.

[9] The Eleventh Circuit.

The Eleventh Circuit's position with regard to the rights of a general agent have recently been clearly stated in *E.S. Binnings, Inc. v. M/V SAUDI RIYADH*, *supra*. In this case, the

owner of the vessel had entered into an agency contract with a New York based steamship agent which was to act as general agent servicing the owners' vessels in the U.S. Gulf ports. The contract permitted the general agent to enter into contracts with sub-general agents, which they did with Binnings, for the Gulf. Binnings solicited cargo, provided documentation and financial services and general husbanding services. The Court of Appeals reversed a District Court holding that had granted Binnings a maritime lien, on the basis that the services provided were of the type traditionally held not to give rise to a maritime contract, because they are preliminary to services leading to maritime contracts. The Circuit Court felt guided by the "relatively clear line of demarcation" that the preliminary contract rule provides for drawing the boundaries of admiralty contract jurisdiction. Citing from *The THAMES*, *supra*, the Circuit Court stated:

> The distinction between preliminary services leading to a maritime contract and such contracts themselves have [sic] been affirmed in this country from the first, and not yet departed from. It furnishes a distinction capable of somewhat easy application. If it be broken down, [one cannot] perceive any other dividing line for excluding from the admiralty many other sorts of claims which have a reference, more or less near or remote, to navigation and commerce. If the broker of a charter-party be admitted, the insurance broker must follow—the drayman, the expressman, and all others who perform services having reference to a voyage either in contemplation or executed. 815 F.2d at 663.

To date, the quoted reasoning of *The THAMES* has been followed on a wide scale.[23]

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Second Circuit: *Peralta Shipping Corp. v. Smith & Johnson (Shipping) Corp.*, *supra*; *Boyd, Weir & Sewell, Inc. v. Fritzen-Halcyon Lijn, Inc.*, 709 F. Supp. 77 (S.D.N.Y. 1989)

Fourth Circuit: *Outbound Maritime Corp. v. P.T. Indonesian Consortium*, 582 F. Supp. 1136, 1141 (D. Md. 1984)

The court in *Binnings*, after citing *Peralta*, *supra*, and *Minturn* with approval, and having distinguished both *Hadjipateras*, *supra*, and *Hinkins*, *supra*, concluded that:

> Binnings' agreement does not involve management and operation of NSCSA vessels. It is merely an agency agreement providing for the performance of services that no doubt facilitate maritime activity but, under long-standing precedent, are not sufficiently related to actual maritime activity to support admiralty jurisdiction. *Id.* at 664.

The services performed by Exxon, while undoubtedly helpful to Waterman, likewise were not related to actual maritime activity.

(B) Summary of Principles Adhered to by the Circuits.

The review of relevant cases decided in the Circuits clearly shows that over the past 135 years virtually every Circuit has abided by the rule established in *Minturn*. Whether or not the antecedents of the *Minturn* decision remain valid, the courts of this nation have used the *Minturn* decision as a guiding tool to reach a just result: to distinguish those preliminary services which are not sufficiently related to actual maritime activity to support maritime jurisdiction from those services that are. The Circuits have followed the reasoning that a claimant's entitlement to the extra security of a secret lien on a vessel should depend on the claimant's reliance on the credit of that vessel. If he is a stranger to the vessel, dealing with the vessel on a short-term basis and involved with the actual supply of necessaries or repairs, he may have relied on

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Fifth Circuit:	*European-American Banking Corp. v. M/V Rosaria*, 486 F. Supp. 245, 255 (S.D. Miss. 1979)
Seventh Circuit:	*The CITY OF CLARKSVILLE*, 94 F. Rep. 201, 205, (D.C. Ind. 1899)
Ninth Circuit:	*The RUPERT CITY*, 213 F. Rep. 263, 273 (W.D. Wash. 1914)
	Taylor, et al. v. Weir, 110 F. Rep. 1005 (D.C. Or. 1901)
Eleventh Circuit:	*E.S. Binnings, Inc. v. M/V SAUDI RIYADH*, *supra*

the vessel's credit. However, if the claimant had a continuing relationship with the owner of the vessel; dealt primarily with the owner when providing his services and making financial arrangements; was aware of the financial reliability of the owner; and had no direct involvement in the operation and management of the vessel, then the claimant is presumed to have relied upon the credit of the owner and is not entitled to a lien.

(C) Application of these Legal Principles to Services Rendered by Exxon.

When applying the legal principles of the *Minturn* decision, as developed by the courts, one should look at the nature of the services involved, the subject matter of the contract, *Insurance Co. v. Dunham*, *supra* at 29, and the way the contract was executed. Pursuant to a forty year contractual relationship with Waterman, Exxon procured bunkers to be delivered to vessels nominated by Waterman. For forty years Exxon dealt with Waterman, made financial arrangements with Waterman and shortly before the October 26, 1983 Jeddah lifting, increased the then existing credit line with an amount well in excess of the cost of the bunkers to be supplied at Jeddah (J.A. 77, 124, 135). Exxon, having been informed of Waterman's declining financial situation by the local supplier,[24] required its principal to give extra security for Exxon's business risk by requiring that it make arrangements for accounts receivable security with its bank (J.A. 77, 136). Furthermore, Exxon maintained the practice of not arresting customers' vessels (J.A. 80-81). Although the District Court found the existence of a long-standing relationship between Exxon (Pet. App. A13) and considered that long-standing agency relationship as indicative of a general agency (Pet. App. A13), it never made a determination on whether or not Exxon relied solely on the credit of Waterman. Moreover, the question of Petitioner's reliance was never presented

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24 Even without being so informed, Exxon certainly had the capacity to determine a contract partner's financial viability on its own and, in fact, was well aware of Waterman's financial status through its own sources.

to this Court. Therefore, Petitioner's and Solicitor General's suggestion that this Court resolve this case without remanding the matter to the District Court for further determination is improper. The credit issue was not presented to this Court in the Petition for Certiorari; did not receive full briefing; was not decided by the District or Circuit Courts, and is not necessary to the disposition of the case. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443-444 (1989); Supreme Court Rule 14(a).

As stated by Judge Conner in his initial opinion (Pet.App. A30) and reiterated in his opinion upon rehearing (Pet.App. A56), Exxon's role in the Jeddah bunkering transaction was "shoreside" and only preliminary to a contract relating directly to maritime commerce. Despite Petitioner's conclusory statement that "[i]t is difficult to think of a contract more intimately related to maritime commerce than the fuel supply contract in question" (Pet. Brief, at 9), a review of the provisions of that contract confirms, not only that it is not a maritime contract, but that Exxon, in drafting its form agreement, purposefully distanced itself from any involvement with a vessel's navigation, in particular, or with maritime commerce, in general.

Exxon's primary obligation, under the agreement, was to procure marine fuel suppliers for Waterman nominated vessels worldwide. Having done so, with regard to a particular port, Exxon affirmatively excluded itself from any further involvement with the physical delivery of the fuel (except in instances where it supplied the fuel itself). Once Waterman had provided Exxon with seven (7) days notice of an anticipated delivery (¶ E, J.A. 26), all further specifics concerning the delivery, such as exact quantity required, and exact location and time at which delivery was required, had to be transmitted to the supplying company, not Exxon. Any amendments to these specifics were to be transmitted only to the supplying company and Waterman was solely responsible for failure to do so (J.A. 27). Exxon had no obligation with regard to the mechanics of the fueling (J.A. 27) and, in fact, specifically denied any obligation to make any delivery if the

supplying company had insufficient fuel available at the port of delivery (J.A. 27).

Furthermore, pursuant to the Exxon-Waterman contract, Exxon did not deliver the fuel[25] (Clause 3.1, J.A. 21); had no involvement in establishing the price for the fuel (Clause 4.1, J.A. 21); had no liability for demurrage or other losses incurred during loading (Clause 6.1 and 6.5, J.A. 22, 23); had no responsibility for obtaining required delivery permits (Clause 6.2, J.A. 22); had no involvement in determining the exact quantity delivered or the quality thereof (¶ A, J.A. 24), and declined primary responsibility for any oil spills during delivery (¶ F, J.A. 27, 28).

Even applying the most liberal of standards to this procurement agreement, the nature of Exxon's services were clearly preliminary to the maritime contract between Waterman and Arabian Marine and did not have any involvement in the navigation of the vessel or direct juridical connection with maritime commerce—Exxon's sole role was administrative. As such, Exxon's general agency agreement with Waterman falls within the established rule of law excluding preliminary contracts and well outside any definition of a maritime contract.

IV.

REVERSAL OF *MINTURN* WILL NOT ENHANCE STABILITY NOR WILL IT PROMOTE MARITIME COMMERCE.

Petitioner and the Solicitor General request the reversal of the *Minturn* decision and the rejection of the preliminary contract exclusion. While the exclusion of general agents as a group has been criticized by recent commentators, the courts have adhered to it as being the established rule, at times carving out an exception for those agents who are not general or husbanding agents, but instead, operational or management

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25 In addition, pursuant to the Exxon-Arabian Marine agreement, Exxon was specifically excluded from the chain of title to the fuel (J.A. 84).

agents. Reversal of *Minturn* would topple the case law developed over the past 135 years and open the admiralty courts to other contract "anomalies" that have consistently been considered to be non-maritime. An updated version of the enumeration of preliminary contracts in *The THAMES*, *supra*, at 801-802, would include "charter party broker,[26] freight broker,[27] vessel construction contract,[28] and the attorney who provides legal services to avoid the arrest of the vessel.[29] All these contracts include services without which the vessel's capacity to participate in maritime commerce would be hampered. If the standard becomes that all "anomalies" or legal fictions with respect to maritime liens be abolished, whether or not they provided practical rules the industry lives by, a reversal of *Minturn* will have a much more radical effect than suggested by Petitioner and the Solicitor General.

Although not without criticism similar to the criticism cited by Petitioner, it is a well established rule of law that no maritime lien attaches for services rendered pursuant to a contract to build a vessel. This rule dates back to 1857 when the same Court[30] that decided *Minturn*, settled the question whether admiralty jurisdiction extended over a contract to construct the hull of a vessel. *People's Ferry Co. of Boston v. Beers*, 61 U.S. (20 How.) 393 (1857). The Court decided that it did not. One can hardly think of a contract more related to the maritime commerce than one to build that industry's vehicle itself. The *People's Ferry* decision, however, has been upheld for over 130 years. Undoubtedly, Petitioner's arguments against *Minturn* could be similarly made in favor of extending admiralty jurisdiction to shipbuilding contracts, or for that matter, any preliminary contract that has a tangential

26 *Minturn v. Maynard*, 58 U.S. (17 How.) 476 (1854).

27 *The Harvey & Henry*, 86 F. 656 (2d Cir. 1898).

28 *People's Ferry Co. of Boston v. Beers*, 61 U.S. (20 How.) 393 (1857).

29 Mattis, *Maritime Liens for "Necessaries": A Tale of Statutory Misinterpretation*, Vol. 21, No. 3, Mar. L. Com., at 392, n. 400.

30 Chief Justice Taney, having been indisposed, did not sit in this case.

relation to the navigation of vessels or maritime commerce. If *Minturn* is reversed to allow a lien to a general agent, nothing should stand in the way of reversing *People's Ferry Co.*, *supra*.

Preliminary services rendered as an aid to maritime commerce do not make them "necessary" or "indispensable." If Exxon had refused to guarantee payment to the local supplier, other options remained open to Waterman to ensure its vessel stayed in the stream of commerce. Waterman could have gone to another supplier or paid the local supplier at the time of purchase.

There is no Federal interest compelling admiralty jurisdiction over contractual disputes involving preliminary services. Moreover, allowing maritime liens to those rendering preliminary services would authorize a vastly greater number of claimants to arrest vessels which will, in fact, impede maritime commerce instead of promoting it, thus defying the Constitutional purpose of the Admiralty grant to Federal courts.[31]

Granting maritime jurisdiction to providers of preliminary services will create additional secret liens for the owner who charters his vessel and who may not be involved in the operation of the vessel to contend with. Because of this secret nature, the scope of transactions giving rise to maritime liens should be narrowly construed. *Todd Shipyards Corp. v. The CITY OF ATHENS*, 83 F. Supp. 67 (D. Md. 1949), *aff'd*, 177 F.2d 961 (4th Cir. 1949).

Due to the conceptual origin of liens lying in the personification of the ship itself, the lien constitutes an interest in the *res* and will follow the vessel when sold. Therefore, the creation of secret liens on the vessel for all manner of preliminary services, not directly related to the navigation of the vessel, can seriously burden the innocent purchaser. Canada and

31 In this respect, it is difficult to understand the government's position in the case at bar, in that they, as shipper, owner and operator, would not benefit from the creation of a new *in rem* action. In contrast to *Sisson v. Ruby*, 497 U.S. _____, 110 S. Ct. 2892 (1990), where the government took a more understandable restrictive view on admiralty jurisdiction, its position seeking to expand admiralty jurisdiction herein seems anomalous.

England, both sea-faring jurisdictions, have avoided this problem by enacting statutory *in rem* actions for services rendered to the vessel instead of secret liens. In both jurisdictions, the *in rem* action is extinguished when the vessel is sold. Petitioner has not presented any compelling reason why this Court should not affirm the *Minturn* rule in order to prevent an increase in unwarranted secret liens.

CONCLUSION

The Judgment of the Court of Appeals for the Second Circuit should be affirmed in all respects.

Respectfully submitted,

FRANCIS A. MONTBACH
Counsel of Record

KARIN A. SCHLÖSSER

BIGHAM ENGLAR JONES & HOUSTON
Counsel for Respondents
CENTRAL GULF LINES, INC., et al.
14 Wall Street
New York, New York 10005
(212) 732-4646

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No. 90-34

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

EXXON CORPORATION,

Petitioner,

—v.—

CENTRAL GULF LINES, INC., *in personam*, and the M/V GREEN HARBOUR (ex WILLIAM HOOPER), *in rem*, her engines, boilers, tackle, etc. and a certain Letter of Credit No. P 621208 dated December 26, 1984 issued by the Chase Manhattan Bank, N.A., *in rem*,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER EXXON CORPORATION

ARMAND MAURICE PARÉ, JR.
Counsel of Record

BRADLEY F. GANDRUP, JR.

NOURSE & BOWLES
Counsel for Petitioner
One Exchange Plaza
At 55 Broadway
New York, New York 10006
(212) 952-6200

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REPLY BRIEF FOR PETITIONER EXXON CORPORATION

This reply brief is written on behalf of Exxon Corporation (hereinafter "Exxon" or "Petitioner") in reply to the answering brief ("Answering Brief") of Central Gulf Lines, Inc. ("Central Gulf" or "Respondent") filed in opposition to the earlier brief ("Main Brief") submitted by Petitioner in support of its lien claim respecting a supply of fuel oil delivered at Jeddah, Saudi Arabia (the "Jeddah Delivery") to the M/V

Green Harbour (ex William Hooper) while the vessel was on bareboat charter from Central Gulf to the Waterman Steamship Corporation ("Waterman").

I.

Reply to Central Gulf's Point Concerning the FMLA

Central Gulf 's first point does not address whether a *Minturn* agent is entitled to admiralty jurisdiction. Instead, it apparently assumes jurisdiction and discusses only whether a *Minturn* agent is entitled to a maritime lien in light of the original Federal Maritime Lien Act of 1910, ch. 373, 36 Stat. 604 and the amendments thereto (hereinafter collectively referred to as "FMLA").

Central Gulf argues at pages 7-24 of its Brief that Congress did not specifically include *Minturn* agents within the scope of the FMLA. Central Gulf concludes its point by arguing: "where Congress has acted, either by inclusion or exclusion *of a specific group of beneficiaries*, under the FMLA, only Congress can change such statute. . . ." Answering Brief at 23 (emphasis added).

Central Gulf's reliance on the FMLA to determine whether a *Minturn* agent is entitled to a lien is based on at least two faulty premises. First, contrary to Central Gulf's assertions (Answering Brief at 8, 20, 21, 22, and 23), there is no specific list of "persons" who are intended beneficiaries in the FMLA. Instead of being "person"-specific, the FMLA describes the broad type of services and supplies covered by it. A review of the cases under 46 U.S.C. § 971 (1982 & Supp.V.) (now re-codified at 46 U.S.C.A. §31342 (a)(3)) demonstrates the wide array of services and supplies (provided both directly and indirectly) which have been held to be within the FMLA. What the FMLA does do is to establish certain

uniform rules and presumptions for enforcing liens for services and supplies which court decisions have held to be covered by it.

The net result should be that whenever a court determines that a contract for services and supplies is a maritime contract, and the services and supplies are, as here, of a type covered by the FMLA, then the FMLA rules and presumptions[1] apply. *See The Golden Gate*, 52 F.2d 397 (9th Cir.), *cert. denied*, 284 U.S. 682 (1931).

Furthermore, at the time of enactment of the FMLA a lien existed under the general maritime law which should cover the case at bar. *The Kalorama*, 77 U.S. (10 Wall.) 104 (1869); *The Emily B. Souder*, 84 U.S. (17 Wall.) 666 (1875). Central Gulf's assumption to the contrary is therefore erroneous.[2] Also, cases decided since enactment of the FMLA would grant a lien in this case despite the physical supply having been made by a local supplier. *The Golden Gate, supra*; *see also Gulf Oil Trading Co. v. M/V Caribe Mar*, 757 F.2d 743, 746 (5th Cir. 1985).

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[1] *See* 46 U.S.C. § 971 (1982 & Supp.V 1987) (now re-codified at 46 U.S.C.A. § 31342(a)(3).

[2] Central Gulf attempts to distinguish *The Kalorama* on the grounds that it only applies where there is "a common intent on the part of the owner and agent to deal *exclusively* on the credit of a specific vessel." Answering Brief at 31, n. 19 (emphasis added). Neither *The Kalorama* nor the cited district court case, *The Allianca*, 63 F. 726 (S.D.N.Y. 1894), support Central Gulf's use of the word "exclusively". *See id.* at 732 and the FMLA provisions in note 1, *supra*.

II.

Reply to Central Gulf's Point Concerning Analysis of the *Minturn* Decision

Central Gulf has not accurately characterized Petitioner's analysis of the various principles underlying *Minturn*. Petitioner's analysis of *Minturn* is not based on supposition, but on the specific arguments contained in the *Minturn* briefs. Neither the briefs nor the decision itself substantiate Central Gulf's assertion that *Minturn* was based on the preliminary contract notion. *See Minturn* Appellees' Brief at 4-9.

Central Gulf also argues that the subject matter test of a maritime contract existed and was "well developed" at the time of *Minturn*, citing *dicta* from *Waring v. Clarke*, 46 U.S. (5 How.) 441, 468-69 (1847). Answering Brief at 31.*Waring* was a tort case involving a collision between two vessels. The cases contained in the passage quoted by Central Gulf do not support the existence of a "subject matter" test in contract matters as that term would be understood today. See also the authorities referred to in Petitioner's Main Brief at 26 and n.9.

The test of a maritime contract has been and remains elusive, and in need of definition. In R. Baer, *Admiralty Law of the Supreme Court*, 356-57 (1969) the author can only conclude in the short chapter dedicated to maritime contract jurisdiction: "*[i]n brief, admiralty jurisdiction will attach if a majority of the Court chooses to classify the contract as maritime.*" (emphasis in original).

III.

Reply to Central Gulf's Characterization of *Minturn* in the Lower Courts

A) *Central Gulf's Summary of Minturn in the Lower Courts*

Central Gulf argues there is harmony among the circuits over *Minturn*. This is incorrect. There is layer upon layer of discord as indicated in the Petition for a Writ of Certiorari at 5-7, Petitioner's Main Brief at 35-36, the Solicitor General's brief for a writ of certiorari at 5-7 and the Solicitor General's brief on the merits at 35-40. This discord has been caused by the fundamental irrationality of the *Minturn* rule and by *ad hoc* attempts by various courts to circumvent it.

The root cause of the discord (and *Minturn*'s irrationality) is the universally recognized point that the services of general agents are vital to maritime commerce and, therefore, that the arbitrary exclusion of claims by general agents from admiralty jurisdiction is inconsistent with the purpose of the constitutional grant of admiralty jurisdiction, i.e. the protection and promotion of maritime commerce.

Central Gulf has also mixed in with its discussion of *Minturn* some lower court cases which held, in certain instances, that the general agents there were presumed not to have relied on the credit of vessels serviced. Since the so-called presumption is said to have derived from *Minturn*, it should be rejected with *Minturn*. Indeed, at least one circuit has questioned the presumption in light of the FMLA. The Fifth Circuit recently observed that "[i]n light of the federal lien statute and the strong presumption that operates in favor of maritime liens, it is not entirely clear to us why the general agency presumption continues to survive." *First National Bank*

of Jefferson Parish v. M/V Lightning Power, 851 F.2d 1543, 1546 n. 3 (5th Cir. 1988). Furthermore, both *Lightning Power* and *The M. Vivian Pierce*, 48 F.2d 644, 645 (D. Mass. 1931), cited by Central Gulf, provide that the so-called presumption is rebuttable. In fact, *The Centaurus*, 291 F. 751, 752 (4th Cir. 1923), also cited by Central Gulf, specifically indicates that the general agent in that case (who was also a part owner) could have rebutted this presumption and acquired a lien by showing an "express agreement, oral or in writing by which Appellant, agent as aforesaid, reserved a specific lien upon the ships for the advances sued for." In that case there was no such specific reservation of a lien. In the case at bar, there was such a specific reservation of a lien (J.A. 24, ¶(B)) and hence Exxon is entitled to a lien even under such cases.

B) *Summary of Central Gulf's "Principles"*

Central Gulf concludes this point by stating:

> The Circuits have followed the reasoning that a claimant's entitlement to the extra security of a secret lien on a vessel should depend on the claimant's reliance on the credit of that vessel. If he is a stranger to the vessel, dealing with the vessel on a short-term basis and involved with the actual supply of necessaries or repairs, he may have relied on the vessel's credit. However, if the claimant had a continuing relationship with the owner of the vessel; dealt primarily with the owner when providing his services and making financial arrangements; was aware of the financial reliability of the owner; and had no direct involvement in the operation and management of the vessel, then the claimant is presumed to have relied upon the credit of the owner and is not entitled to a lien.
>
> Answering Brief at 42-43

There is no law that supports these broad propositions. In fact, these points are completely inconsistent with the presumptions contained in the FMLA.[3] Furthermore, by way of example, Petitioner was granted a lien for fuel delivered in New York in this very case, despite Petitioner's long standing arrangement with Waterman.

C) *Central Gulf's Application of Its Legal "Principles" to This Case*

Central Gulf attempts to make much of Petitioner's extension of credit in this case. Virtually every case that involves a lien question, however, involves the granting of credit by the supplier who has not insisted on being paid at the time of the service or supply. *See also Gulf Oil Trading Co. v. M/V Caribe Mar*, 757 F.2d 743, 750 (5th Cir. 1985) ("The simple existence of a business relationship and credit arrangements could hardly be realistically construed as an intent or purpose by [plaintiff] to waive its lien on the vessel.")

Central Gulf is incorrect in stating that Petitioner "maintained the practice of not arresting customer's vessels." Answering Brief at 43. In fact, Petitioner had pursued its lien rights against its customers. This included both threatening the arrest of vessels and actually arresting vessels (J.A. 140-144; 80-81).

Central Gulf argues that the district court "never made a determination on whether or not Exxon relied *solely* on the credit of Waterman." Answering Brief at 43. (emphasis

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[3] The statute provided, at 46 U.S.C. § 971 (1982 & Supp.V 1987), that: "Any person furnishing repairs, supplies . . . shall have a maritime lien . . . and it shall not be necessary to allege or prove that credit was given to the vessel." The present equivalent is contained at 46 U.S.C.A. § 31342(a)(3).

added). The issue of Exxon's entitlement to judgment, however, came up on motion and cross-motion for summary judgment. Central Gulf was obligated, *at that stage*, to raise any fact bearing on Petitioner's right to judgment. Although the issue of "sole" reliance was raised by Central Gulf (Pet. App. 27), Central Gulf offered no meaningful evidence[4] on this point. The affirmative evidence offered by Exxon showed that the Exxon/Waterman contract specifically provided that deliveries were "made not only on the credit of the Buyer but also on the faith and credit of the vessel which used the Marine Fuel. . . ." (J.A. 24). In addition, Exxon showed that it had relied on the security of liens by having enforced them in the past (J.A. 140-41; 80-81). Exxon also offered evidence that neither it (J.A. 138, item 4) nor the local supplier (J.A. 53-55) had knowledge of a prohibition of lien clause later said to be in the Central Gulf/Waterman charter.

Furthermore, as the commentators, court decisions and the FMLA make clear, the heavy burden of proof on "sole" reliance is on Central Gulf. See authorities contained in Petitioner's Main Brief at page 47. Having not submitted any meaningful evidence on the issue of sole reliance when required to do so, Central Gulf should not now, years later, be allowed to relitigate this issue in the District Court. To avoid a waste of judicial resources, especially on an issue so clear as that here which arose on motion for summary judgment, the Court should direct judgment in favor of Exxon. *The First*

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[4] Central Gulf argued then, as now, 1) that Exxon increased Waterman's credit line, 2) Exxon sought other security from Waterman, and 3) Exxon allegedly never arrested vessels for unpaid fuel. "Memorandum of Law of Central Gulf Lines, Inc. In Opposition of Plaintiff's Motion for Summary Judgment" filed June 23, 1988 at pages 21-22. The first two points are insufficient as a matter of law to avoid judgment and the third is incorrect.

National Bank of Pennsylvania v. The Lincoln National Life Insurance Co., 824 F.2d 277, 282 (3d Cir. 1987).

IV.

Reply to Central Gulf Point That Rejection of *Minturn* is Unnecessary

Central Gulf argues for application of what it characterizes as the preliminary contract aspect of *Minturn*. Under Central Gulf's view, Exxon's involvement was only preliminary and "tangential." Under the universal view of the commentators, however, the role of a general agent is critical to maritime commerce. This is particularly true in this case since, if Exxon had not arranged for the fuel under its contracts, the vessel would have been stranded in Jeddah. Central Gulf's notion that Waterman could have fueled the vessel at Jeddah by other means is belied by the facts, which show that Waterman's own local supplier refused Waterman's request to fuel the vessel (J.A. 35, 49-51).

Central Gulf's attempt to invoke the preliminary contract distinction in this case shows the arbitrariness of that distinction.[5] Instead of relying on such an arbitrary test, the jurisdictional inquiry should be into the relation between the services or supplies provided and maritime commerce. In this case, Exxon both procured, advanced its credit and paid for the fuel. Further, Exxon continued to have potential involvement at the dock in Jeddah by reason, for instance, of Exxon's right to take action in the event of a fuel spill (J.A. 27-28) and even thereafter by reason of Buyer being required to submit claims

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[5] *See* 1 S. Friedell, *Benedict on Admiralty* § 183, 12-8 & n. 8 (7th ed. 1989) discussing the difficulty of reconciling the preliminary contract idea with the recent case of *Ingersoll Milling Machine Co. v. M/V Bodena*, 829 F.2d 293 (2d Cir. 1987), *cert. denied*, 484 U.S. 1042 (1988).

for quality, quantity and price of the fuel to Exxon within 45 days (J.A. 24). In short, the services and supplies effected by Exxon were vital to the vessel and its role in maritime commerce. Granting Petitioner jurisdiction in this case will not, as suggested by Central Gulf, open the federal courts to suits by agents of all varieties, irrespective of the importance of the services they might provide to maritime commerce.

Finally, Central Gulf suggests that granting liens to general agents will impede maritime commerce by allowing more vessels to be arrested on account of "secret liens".[6] However, recognizing liens in this and other service and supply cases will both protect an important segment of the shipping industry and facilitate the advancement of credit to vessels, thereby protecting and promoting the interests of maritime commerce.

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[6] In the last two paragraphs of its Answering Brief, Central Gulf refers to the phrase "secret liens" on four separate occasions. There is nothing "secret" about the fact that a lien might arise from the sales of bunkers to a vessel. Furthermore, *bona fide* purchasers of vessels routinely guard against liens by obtaining warranties that purchased vessels are free and clear of liens. *See also* G. Gilmore & C. Black, *The Law of Admiralty* § 9-77 (2d ed. 1975) indicating the short time available to assert a lien against a vessel purchased by a *bona fide* purchaser.

Conclusion

For the reasons stated herein and in Petitioner's Main Brief, Petitioner respectfully requests that the judgment below, which held Exxon's suit and lien claim respecting the Jeddah Delivery were outside admiralty jurisdiction, be reversed, and that the district court be directed to enter judgment in favor of Exxon, after giving Central Gulf credit for amounts paid, and for any further and different relief as may be just and equitable.

Respectively submitted

ARMAND MAURICE PARÉ JR.
Counsel of Record

BRADLEY F. GANDRUP, JR.

NOURSE & BOWLES
Counsel for Petitioner
One Exchange Plaza
At 55 Broadway
New York, New York 10006
(212) 952-6200

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In the Supreme Court of the United States

OCTOBER TERM, 1990

EXXON CORPORATION, PETITIONER

v.

CENTRAL GULF LINES, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

DAVID L. SHAPIRO
Deputy Solicitor General

HARRIET S. SHAPIRO
Assistant to the Solicitor General

ROBERT S. GREENSPAN
RICHARD A. OLDERMAN
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether an agent who procures and pays for necessary maritime supplies for a vessel in maritime commerce is entitled to assert a maritime lien against the vessel.

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INTEREST OF THE UNITED STATES

The United States has a substantial interest in the scope of admiralty jurisdiction, both in its capacity as an owner and operator of ships, and in its role as a major shipper. Although maritime liens do not lie against vessels owned by or operated for or by the United States (46 U.S.C. App. 741; 46 U.S.C. App. 788), in personam actions may be brought against the United States in all cases where admiralty jurisdiction would lie if the vessel were privately owned or operated (46 U.S.C. App. 742). Thus, the decision in this case may have a significant impact on the availability of in personam actions in admiralty against the United States.

Moreover, the United States has a general interest in the proper and uniform application of the laws governing admiralty jurisdiction. In response to the Court's invitation at the petition stage of this case, the Solicitor General filed a brief urging that the petition be granted.

STATEMENT

1. This case involves a vessel, the M/V Green Harbour ex William Hooper (the Hooper); the vessel's owner, respondent Central Gulf Lines, Inc.; the vessel's charterer, Waterman Steamship Corporation (Waterman); and Waterman's fuel supplier, petitioner Exxon Corporation.

Petitioner served for more than four decades as the exclusive world-wide supplier of marine fuel for Waterman's vessels. Under the terms of their agreement, Waterman notified petitioner when a Waterman vessel needed fuel. Petitioner then either delivered the fuel to the vessel directly, or (where petitioner had no local delivery facilities) arranged with a local supplier to provide the fuel. When a local supplier was used, petitioner paid the supplier and then billed Waterman. In these situations, the practical effect of the agreement was that the fuel supplier relied on petitioner's credit rather than Waterman's. Pet. App. A23.

The local supplier used by petitioner at the port in Jeddah, Saudi Arabia, was Arabian Marine Operating Co., Ltd. (Arabian Marine). The agreement between Arabian Marine and petitioner stated that petitioner would "solicit and arrange" for the sale of marine fuel to vessels calling at the port of Jeddah; that Arabian Marine would supply this fuel and petitioner would pay for it; and that Arabian Marine

would pay petitioner a commission. Petitioner never had title to the fuel; it passed directly from Arabian Marine to the receiving vessel. Pet. App. A24-A25.

2. On October 26, 1983, Arabian Marine delivered 4,242.47 tons of marine fuel to the Hooper, pursuant to the agreement between petitioner and Waterman and the agreement between petitioner and Arabian Marine. Petitioner paid Arabian Marine for the fuel, and in November 1983 billed Waterman for its $763,644 cost. Pet. App. A24-A25.

The bill to Waterman was not paid. Instead, on December 1, 1983, Waterman sought reorganization under Chapter 11 of the bankruptcy laws. During reorganization proceedings, respondent agreed that, should a court hold the Hooper liable in rem for the cost of the fuel, respondent would assume personal liability for that cost. Respondent provided petitioner with a letter of credit as security for this promise. Pet. App. A25.

After a reorganization plan for Waterman was confirmed in June 1986, petitioner was permitted to pursue its claim for the cost of supplying marine fuel to the Hooper. Pet. App. A25.[1] Accordingly, petitioner commenced this lawsuit in federal district court against both respondent and the Hooper. Petitioner asserted that its agreement with Waterman to procure fuel in Saudi Arabia fell within the district court's admiralty jurisdiction. Petitioner therefore claimed to have a maritime lien on the Hooper pursuant to the Federal Maritime Lien Act, 46 U.S.C. 31342.[2]

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[1] Petitioner received certain cash and stock dividends under the reorganization plan; any judgment recovered in this action would be reduced to reflect these receipts. Pet. App. A25.

[2] Formerly 46 U.S.C. 971 (1982). See Pet. App. A26.

3. The district court concluded that there was no admiralty jurisdiction over petitioner's claim, and that without such jurisdiction there could be no maritime lien. Pet. App. A27-A28. The court noted that "[w]hile admiralty jurisdiction provides 'fairly complete coverage of the primary operational and service contracts of the shipping industry,' there still exist 'a few anomalous exceptions'" (*id.* at A28, quoting G. Gilmore & C. Black, *The Law of Admiralty*, § 1-10 (2d ed. 1975)). One of these "anomalous exceptions," the court continued, is the rule that general agency contracts—agreements to arrange for the provision of supplies and services to a vessel—fall outside the scope of maritime jurisdiction. The court observed (Pet. App. A28) that in *Peralta Shipping Corp.* v. *Smith & Johnson (Shipping) Corp.*, 739 F.2d 798 (1984), cert. denied, 470 U.S. 1031 (1985), the Second Circuit adhered to this exception, holding itself bound by this Court's decision in *Minturn* v. *Maynard*, 58 U.S. (17 How.) 476 (1854). Applying "the principles enunciated in *Peralta*" to the facts of this case (Pet. App. A29), the district court concluded that the agreement whereby petitioner arranged for the provision of fuel to Waterman's vessels at Jeddah constituted an agency contract (*id.* at A29-A30); that the services supplied were strictly "shoreside" (*id.* at A30); and that there was no legitimate basis for distinguishing the general agency, or husbanding, contract at issue in *Peralta* from the agreement here (*id.* at A31).

In a subsequent opinion (Pet. App. A3-A21), the court denied petitioner's motion for reconsideration. The court reiterated that "Exxon wore its agency hat when it procured [marine fuel] for the Hooper in Jeddah," and that "the locus of Exxon's relationship with Waterman was the United States, not the dock

in Jeddah." *Id.* at A6. Accordingly, the case fit within the exception for general agency contracts forged by this Court in *Minturn*. The court observed that although the *Minturn* rule was an "anomalous exception to the broad coverage of maritime jurisdiction [which] had 'suffered some erosion in other circuits'" (*id.* at A11), the Second Circuit in *Peralta* had refused to depart from *Minturn*, absent action by this Court. *Id.* at A11-A12. The district court declined "to do what the Second Circuit refused to do in *Peralta*." *Id.* at A12.

The district court rejected petitioner's argument that in procuring fuel for Waterman it was acting as a special and not a general agent. Pet. App. A13. The court determined that the forty-year relationship between Waterman and petitioner, and petitioner's "quite broad" authority under its agreement with Waterman, established petitioner as Waterman's general agent. It observed that the Second Circuit had refused to distinguish special agency agreements from general ones; and that in any event, special agents that provide preliminary services fall outside admiralty jurisdiction. *Id.* at A13-A14.[3] The court spe-

[3] Commencing at least as early as 1881, in *The Thames*, 10 F. 848 (S.D.N.Y. 1881), courts in the Second Circuit embraced the rule that contracts of a "preliminary" nature are outside federal admiralty jurisdiction. Ultimately, the holding of this Court in *Minturn* and the rule declared in *The Thames* became entwined. In *Cory Bros. & Co.* v. *United States*, 51 F.2d 1010, 1012 (1931), the Second Circuit explained *Minturn* as involving a preliminary service contract.

The district court in this case, observing that "the agency exception to maritime jurisdiction is less of an anomaly when viewed as a subset of the preliminary contract doctrine," rejected petitioner's invitation to "disentangle the preliminary contract rule from the general agency rule." Pet. App. A16-A17. See *id.* at A29 (quoting *The Thames*).

cifically ruled that the "services performed by [petitioner at Jeddah] were merely preliminary" (*id.* at A17), and that, accordingly, the contract at issue was not maritime, regardless of how the agency was characterized.[4]

4. The court of appeals affirmed, "substantially for the reasons given in [the district court's] two thorough opinions" (Pet. App. A2).

SUMMARY OF ARGUMENT

1. This Court's decision in *Minturn* v. *Maynard* should be overruled. The Court's cryptic opinion in that case, which has been variously interpreted by the lower courts ever since, may have rested on three notions of admiralty jurisdiction: the tidewater exception to that jurisdiction; the "hypothecation" requirement (that one claiming on a contract must have a lien interest in the vessel before the contract would be considered maritime); and the view that a demand for a balance on accounts must be pursued in an action in *assumpsit* in a common law court. Each of these notions has been squarely rejected by this Court. Thus, whatever the basis for the decision may have been in 1854, that basis no longer exists.

Moreover, there is no agreement in the lower courts on the current meaning or vitality of the *Minturn* holding. The Second Circuit views the holding as requiring the exclusion of all agency agreements from the reach of admiralty jurisdiction. Other circuits appear to view the decision only as barring an action for "an accounting as such" (*Hadjipateras* v. *Pacifica*,

[4] The district court also rejected petitioner's claim that it was entitled to an admiralty lien by virtue of subrogation (Pet. App. A18-A21). Petitioner does not seek further review of this claim.

S.A., 290 F.2d 697, 703 (5th Cir. 1961)), or as excluding only certain kinds of agency agreements. Thus, a determination that *Minturn* is no longer binding precedent will not only eliminate an anomaly in maritime law and help rationalize admiralty jurisdiction, it will also eliminate widespread confusion as to the present impact of the Court's holding.

2. If this Court's decision in *Minturn* is overruled, the question will remain as to what agency contracts fall within the reach of admiralty jurisdiction. Some contracts—including agency contracts—are sufficiently remote from maritime commerce that they do not fall within that reach, and the limits of the jurisdiction must be defined in the context of particular cases. But whatever those limits may be, we do not believe they are exceeded here, since this agency agreement involves a suit by an agent for reimbursement for the cost of supplying a vessel with necessary marine fuel. The Court should therefore determine that, on the record in this case, admiralty jurisdiction has been established.

ARGUMENT

I. *MINTURN* v. *MAYNARD* SHOULD BE OVERRULED

Minturn v. *Maynard*, *supra*, created an oddity of federal admiralty jurisdiction; its historical antecedents have been eroded, and its serves no continuing purpose in current maritime law. It is beyond dispute that an action seeking to recover the cost of supplying fuel to a vessel—the purpose of this suit—is within a federal court's admiralty jurisdiction. Yet, the rule of *Minturn* prevents the assertion of admiralty jurisdiction simply because the owner's agent, rather than a third party, seeks payment for the fuel.[5] This Court, in the years since *Minturn* was decided, has refused to make admiralty jurisdiction turn on such artificial distinctions. Accordingly, the rule that general agency contracts are outside admiralty's reach should be abolished.

A. The Historic Antecedents Of *Minturn* No Longer Justify Its Result

Early in the nineteenth century, Justice Story observed that the admiralty jurisdiction of the United States includes "all contracts (wheresoever they may be made or executed, or whatsoever may be the form of the stipulations) which relate to the navigation, business or commerce of the sea." *De Lovio* v. *Boit*, 7 F. Cas. 418, 444 (C.C.D. Mass. 1815) (No. 3776). Whether a contract is governed by maritime law thus depends on the subject matter of the agreement.

[5] For example, in this case, petitioner's claim for recovery under its contract with Waterman for fuel supplied from its own facilities in New York fell within admiralty jurisdiction (Pet. App. A33), although deliveries under the same contract through the local supplier in Jeddah did not.

See *North Pacific S.S. Co.* v. *Hall Bros. Marine Ry. & Shipbuilding Co.*, 249 U.S. 119, 125 (1919); *Kossick* v. *United Fruit Co.*, 365 U.S. 731, 736 (1961). Nonetheless, as this Court has noted, "[t]he boundaries of admiralty jurisdiction over contracts—as opposed to torts or crimes—being conceptual rather than spatial, have always been difficult to draw." *Kossick* v. *United Fruit Co.*, 365 U.S. at 735. See S. Friedell, *Benedict on Admiralty* § 183, at 12-8 (7th ed. 1989). It is not surprising, therefore, that decisions marking this boundary are often difficult to reconcile.[6] See *Sisson* v. *Ruby*, 110 S. Ct. 2892, 2900, 2901 & n.4 (1990) (Scalia, J., joined by White, J., concurring in result and noting "[t]he impossibility of drawing a principled line with respect to what, in

[6] It has been held, for example, that a contract to repair a vessel is maritime, *New Bedford Dry Dock Co.* v. *Purdy*, 258 U.S. 96 (1922), yet a contract to build a vessel is not, *Thames Towboat Co.* v. *The Schooner Francis McDonald*, 254 F.2d 242 (1920), *People's Ferry Co.* v. *Beers*, 61 U.S. (20 How.) 393 (1857); that a policy of insurance on a vessel is maritime, *Wilburn Boat Co.* v. *Fireman's Fund Insurance Co.*, 348 U.S. 310 (1955), *Insurance Co.* v. *Dunham*, 78 U.S. (11 Wall.) 1 (1870), although a contract to obtain such insurance is not, *F.S. Royster Guano Co.* v. *W.E. Hedger Co.*, 48 F.2d 86 (2d Cir.), cert. denied, 283 U.S. 858 (1931); *Marquardt* v. *French*, 53 F. 603 (S.D.N.Y. 1893); and that a charter party is a maritime contract, *Fisser* v. *International Bank*, 175 F. Supp. 305 (S.D.N.Y. 1958), but a broker's contract to secure such a charter party is not, *Cory Bros. & Co.* v. *United States*, 51 F.2d 1010 (2d Cir. 1931); *Brown* v. *West Hartlepool Steam Navigation Co.*, 112 F. 1018 (5th Cir. 1902). Moreover, while a lease of cargo containers for use on a ship is maritime, *CTI-Container Leasing* v. *Oceanic Operations*, 682 F.2d 377 (2d Cir. 1982), as is a contract to purchase equipment for a ship, *e.g.*, *Radiomarine Corp.* v. *Gulf Northern Co.*, 394 F. Supp. 381 (E.D. Mo. 1975), a contract to purchase a vessel is not, *Economou* v. *Bates*, 222 F. Supp. 988 (S.D.N.Y. 1963).

addition to the fact that the contract relates to a vessel * * * is needed in order to make the contract itself 'maritime.' ").

The source of one of the most idiosyncratic of admiralty's jurisdictional rules is this Court's one-page decision in the 1854 case of *Minturn* v. *Maynard*, 58 U.S. (17 How.) 476. Much criticized, *Minturn* has spawned an "agency exception" to the general rules governing maritime contracts. Even when a contract's subject matter is indisputably maritime, *Minturn* has been interpreted as proscribing federal admiralty jurisdiction if the contract is one of agency.

The libellant in *Minturn*, who was both a general agent and a broker, sued in personam to recover from a vessel's owners money he had spent in procuring ship's services and supplies. Finding "nothing in the nature of a maritime contract in the case," 58 U.S. (17 How.) at 477, this Court dismissed the suit in an extremely brief opinion. The Court's entire explanation for this conclusion was as follows (*ibid.*):

> The libel shows nothing but a demand for a balance of accounts between agent and principal, for which an action in *assumpsit*, in a common law court, is the proper remedy. That the money advanced and paid for respondents was, in whole or in part, to pay bills due by a steamboat for repairs or supplies, will not make the transaction maritime, or give the libellant a remedy in admiralty. Nor does the local law of California, which authorized an attachment of vessels for supplies or repairs, extend to the balance of accounts between agent and principal, who have never dealt on the credit, pledge, or security of the vessel.

The decision in *Minturn* may well have turned on restrictions brought over from English admiralty practice—principally the tidewater exception to maritime jurisdiction, which focuses on the location of the contract rather than its nature, and the hypothecation requirement, *i.e.*, that one suing on a maritime contract have a hypothecation (a lien interest) in the vessel. To see the decision in proper perspective, therefore, requires a brief look at *Minturn*'s historical antecedents.

1. a. In England, during the early Middle Ages, maritime matters were dealt with by courts in English port towns. By the mid-fourteenth century, however, English maritime supremacy and the need for an efficient means to adjudicate maritime disputes led to the creation of the High Court of Admiralty, a maritime tribunal with broad powers.[7] Almost from its creation, this tribunal was unpopular with the local courts in the port towns, prompting Parliament to enact two famous statutes narrowing admiralty's jurisdiction. In the first of these statutes, 13 Rich. II, ch. 5 (1390), Parliament declared that "the admirals and their deputies shall not meddle from henceforth with anything done within the realm, but only of a thing done upon the sea * * *." In the second statute, 15 Rich. II, ch. 3 (1392), admiralty's jurisdiction was restricted with more particularity: "of all manner of contracts, pleas, and quarrels, and all other things rising within the bodies

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[7] According to one writer, the court's jurisdiction included "torts and offenses on the high seas, on British seas, and in ports within the ebb and flow of the tide, matters of prize, * * *, and causes arising on the seashore and in ports." D. Robertson, *Admiralty and Federalism* 40 (1970), quoting Mears, *The History of Admiralty Jurisdiction*, 2 Select Essays in *Anglo-American Legal History*, 312, 328-329 (1908).

of the counties, as well as by land as by water, and also of wreck of the sea, the Admiral's court shall have no manner of cognizance, power, nor jurisdiction."

Over the years, the common law courts continued their efforts "to prevent the admiralty court taking cognizance of contracts made in the country relating to maritime matters." D. Robertson, *Admiralty and Federalism* 42 (1970), quoting Mears, *The History of Admiralty Jurisdiction*, 2 Select Essays in *Anglo-American Legal History* 312, 335 (1908). For example (*id.* at 49-50):

> Starting about 1544, prohibitions began to be used against admiralty with increasing frequency. The great majority of cases involving the use of that writ were cases of maritime contracts made on land. The statutes of Richard II * * * were interpreted literally, in order to oust the admiral of jurisdiction over any case involving a contract made within the body of a county (*infra corpus comitatus*). Thus, charterparties, policies of insurance, and other clearly maritime contracts were held not within the admiralty jurisdiction.

During the reigns of the Tudor kings, the Admiralty Court was revived and enhanced, but it again came under attack from the champions of the common law courts—notably Sir Edward Coke. As one commentator noted, "[i]mmediately upon assuming the chief justiceship of the Court of Common Pleas in 1606, Coke enthusiastically took up the battle against admiralty * * *. During his years on the bench, Coke's militancy against the admiralty led him to deny its jurisdiction over any matters having connection with the land." D. Robertson, *supra*, at 55, 56.

One manifestation of Coke's approach was the tidewater doctrine, which provided that admiralty courts had jurisdiction only over matters taking place on the high seas and within the ebb and flow of the tides. Any action on land, or on inland nontidal waters, was therefore deemed to be outside admiralty's jurisdiction. See, E. Coke, *The Fourth Part of the Institutes of the Laws of England Concerning the Jurisdiction of the Courts* 137 (6th ed.) (London 1681); D. Robertson, *supra*, at 56-58; *De Lovio* v. *Boit*, 7 F. Cas. at 421.[8]

b. Article 3, Section 2 of the Constitution extends the judicial power of the United States "to all Cases of admiralty and maritime jurisdiction." Several early decisions of this Court—apparently assuming that this grant was limited by the English practice—relied on the tidewater doctrine in refusing to assert admiralty jurisdiction over contracts whose subject matter was maritime but whose locus was on land. *The Steamboat Thomas Jefferson*, 23 U.S. (10 Wheat.) 428, 429 (1825); *Pevroux* v. *Howard*, 32 U.S. (7 Pet.) 324, 343 (1833); *The Steamboat Orleans* v. *Phoebus*, 36 U.S. (11 Pet.) 175 (1837); *United States* v. *Coombs*, 37 U.S. (12 Pet.) 72, 76 (1837). Cf. *New Jersey Steam Navigation Co.* v. *Merchant's Bank*, 47 U.S. (6 How.) 343, 392 (1848).[9] But see *De Lovio* v. *Boit*, 7 F. Cas. at 444 (Story, J.).

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[8] As the Court explained in *Grant* v. *Poillon*, 61 U.S. (20 How.) 162, 168 (1857), under the tidewater doctrine "contracts upon land, though to be executed on the sea, and contracts at sea, if to be executed on the land, are not cognizable by the English admiralty."

[9] The acceptance of the tidewater doctrine may have been in part due to a desire not to interfere with state court juris-

In the mid-nineteenth century, this Court rejected the view that the constitutional grant of admiralty jurisdiction to the federal courts adopted the limitations on the English admiralty courts (*Waring* v. *Clark*, 46 U.S. (5 How.) 440, 454-459 (1847)), and in 1851 the Court specifically rejected the applicability of the tidewater doctrine, noting "the unreasonableness of giving a construction to the Consituation which would measure the jurisdiction of the admiralty by the tide." *The Propeller Genesee Chief* v. *Fitzhugh*, 53 U.S. (12 How.) 443, 456 (1851). See *Hine* v. *Trevor*, 71 U.S. (4 Wall.) 555, 566 (1866) ("*The Genesee Chief* * * * removed the imaginary line of tide-water which had been supposed to circumscribe the jurisdiction of the admiralty courts").

Minturn was decided four years after *The Genesee Chief* and did not expressly refer to the tidewater doctrine. Nevertheless, the statement that "there is nothing in the nature of a maritime contract in the case," (58 U.S. at 477) may suggest that the decision has its roots in that doctrine; the contract was not "in the nature of a maritime contract" because the reach of admiralty ended at the tideline, so that

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diction. Chancellor Kent observed (1 J. Kent, *Commentaries* 372 (12th ed. 1873))

> If the admiralty and maritime jurisdiction of the district courts embrace all maritime contracts, then suits upon policies of insurance, charter-parties, martime hypothecations, contracts for building, repairing, supplying, and navigating ships, and contracts between part owners of ships, must be tried in the admiralty by a single judge, to the exclusion of the trial by jury; and the state courts would be divested, at one stroke, of a vast field of commercial jurisdiction.

the contract at issue, which was executed on land, was outside admiralty's jurisdiction.[10]

2. *Minturn* also may reflect another 19th century exception to admiralty jurisdiction—the hypothecation requirement. At the time *Minturn* was decided, it was deemed necessary for one claiming under a contract to have a lien interest in a vessel before the contract would be considered maritime.[11] And a ship's agent (the so-called "ship's husband") was not entitled to a lien. See I. Parsons, *A Treatise on Maritime Law* 100 n.3 (1859); *The Raleigh*, 32 F. 633, 634 (S.D.N.Y. 1887); *The J.C. Williams*, 15 F. 558, 559 (S.D.N.Y. 1883).[12]

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[10] As Professor Moore has noted, "some remnant of the restrictive English mentality regarding the admiralty appears to have been present in the minds of the court that decided the early cases." 7A J. Moore & A. Palaez, *Moore's Federal Practice* ¶ .250, at 3004-3005 n.10 (2d ed. 1988). Indeed, "[o]nly by applying a location test [*i.e.*, the tidewater doctrine] could it be convincingly stated that agreements to procure charters, to arrange contracts or maritime affreightment, and to arrange for or oversee the numerous other necessary activities often delegated to brokers and agents are not directly related to maritime commerce." *Id.* at 3004-3005.

[11] See *Gardner* v. *The New Jersey*, 9 F. Cas. 1192, 1195 (D. Pa. 1806) (No. 5233); Note, *General Agency Agreements and Admiralty Jurisdiction*, 17 Conn. L. Rev. 595, 597-598 (1985).

[12] At the time *Minturn* was decided, the ship's husband was usually a part owner. See *Gould* v. *Stanton*, 16 Conn. 12, 23 (1843); I. Parsons, *A Treatise on Maritime Law* 97 (1859); G. Abbott, *Treatise of the Law Relative to Merchant Ships and Seamen* 136 (5th American ed. 1846). The rationale for denying the lien was that a part owner acting as ship's husband dealt on the credit of his fellow owners, not the credit of the vessel. It was thus generally accepted that "admiralty has no jurisdiction at all in matters of account be-

In its short opinion, the Court in *Minturn* noted the absence of a lien: "the local law of California, which authorizes an attachment of vessels for supplies or repairs, [does not] extend to the balance of accounts between agent and principal, who have never dealt on the credit, pledge, or security of the vessel." 58 U.S. at 477. As one commentator has observed, "[t]he Court's refusal to find that the contract was maritime seems comprehensible only if *Minturn* is taken to represent the then-common line of cases that advocated the necessity of a lien interest against a vessel in all maritime contracts. The Court apparently reasoned that the agent could not assert a lien against a ship under any circumstances and therefore that the contract could never be maritime." See Note, *General Agency Agreements and Admiralty Jurisdiction*, 17 Conn. L. Rev. 595, 604 (1985).

Like the tidewater doctrine, the hypothecation requirement has long been abolished. In *Insurance Co* v. *Dunham*, 78 U.S. (11 Wall.) 1 (1870), the Court held that a contract may be maritime, and give rise to a right to sue on the contract in personam, even when the contract does not create a lien. As the Court explained (*id.* at 26), "the true criterion is the nature and subject-matter of the contract, as

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tween part-owners." *The Steamboat Orleans* v. *Phoebus*, 36 U.S. at 182; cf. *Davis* v. *Child*, 7 F. Cas. 112, 116-117 (D. Me. 1840) (No. 3628).

When the Court in *Minturn* was faced with an action for an accounting brought by a general agent against a vessel's owners, it may have appeared that the controversy was one between co-owners seeking an accounting. In fact, however, Minturn was not a co-owner of the vessel. See Note, *supra*, at n.31 citing *Minturn* Supreme Court Record at 3. Thus, the *Minturn* Court may have based its conclusion on an assumption not supported by the facts.

whether it was a maritime contract, having reference to maritime service or maritime transactions." Subsequent decisions have confirmed that admiralty jurisdiction in the United States is not limited by any hypothecation requirement. See, *e.g.*, *North Pacific S.S. Co.* v. *Hall Bros. Marine Ry. & Shipbuilding Co.*, 249 U.S. 119, 126 (1919); *Detroit Trust Co.* v. *The Barlum*, 293 U.S. 21, 47 (1934).

3. Finally, *Minturn* may have turned on the Court's observation (58 U.S. at 477) that the case involved "nothing but a demand for a balance of accounts between agent and principal, for which an action in *assumpsit*, in a common law court, is the proper remedy." This limitation on admiralty jurisdiction has also been disavowed, albeit somewhat more recently than those previously discussed. In *Archawski* v. *Hanioti*, 350 U.S. 532, 536 (1956), the Court rejected the argument that an action in assumpsit automatically puts the case beyond the reach of a court sitting in admiralty: "It is sufficient this day to hold that admiralty has jurisdiction, even where the libel reads like *indebitatus assumpsit* at common law, provided that the unjust enrichment arose as a result of the breach of a maritime contract."

In short, *Minturn* rests on restrictions upon admiralty jurisdiction that this Court has squarely rejected. See, *e.g.*, 7A J. Moore & A. Palaez, *Moore's Federal Practice* ¶ .250, at 3004-3005 (2d ed. 1988). Yet, the case remains as precedent and has been cited (at least by the Second Circuit) as controlling authority for the broad proposition that general agency contracts are outside admiralty's jurisdiction. Pet. App. A11-A16, A31; accord *Peralta Shipping Corp.* v. *Smith & Johnson (Shipping) Corp.*, 739 F.2d 798, 802-804 (1984), cert. denied, 470 U.S. 1031 (1985);

Admiralty Oriental Line v. *Atlantic Gulf & Oriental S.S. Co.*, 88 F.2d 26, 27 (1937). Cf. *Ingersoll Milling Mach. Co.* v. *M/V Bodena*, 829 F.2d 293, 301-302, cert. denied, 484 U.S. 1042 (1987); *Cory Bros. & Co.* v. *United States*, 51 F.2d 1010, 1012 (1931). *Minturn*'s agency rule is thus like the divided damages rule this Court abrogated more than a decade ago: "The reasons that originally led to the Court's adoption of the rule have long since disappeared." *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 410 (1975).

B. Overruling *Minturn* Would Be In Keeping With Efforts To Rationalize The Scope Of Federal Admiralty Jurisdiction

The commentators are in broad agreement that "[general agency] agreements are an integral part of, and in furtherance of, maritime commerce and, consequently, should be cognizable within the admiralty jurisdiction of the district court." 7A J. Moore & A. Palaez, *Moore's Federal Practice* ¶ .250 at 3006 (2d ed. 1988); accord G. Gilmore & C. Black, *The Law of Admiralty* 28 n.94b (2d ed. 1975); S. Friedell, *Benedict on Admiralty* § 183, at 12-9 (7th ed. 1989). This conclusion is consistent with the goal of uniformity underlying the grant of admiralty jurisdiction to the federal courts, and with the continuing trend toward rationalizing the scope of that jurisdiction.

A primary basis for the establishment of federal admiralty jurisdiction was the need for a uniform national law. *Knickerbocker Ice Co.* v. *Stewart*, 253 U.S. 149, 160 (1920); 3 *Elliot's Debates on the Federal Constitution* 352, 571 (2d ed. 1836); *Sisson* v. *Ruby*, 110 S. Ct. at 2898. Yet, as Justice Blackmun, joined by Justice Marshall, noted in dissenting from the denial of certiorari in *Peralta* (470 U.S. at 1031-

1032), *Minturn* is an exception to admiralty jurisdiction "that has been applied inconsistently and that has created unnecessary confusion in the federal courts." Since "uniformity and predictability in the maritime industry were the ends sought in the Constitution when federal-court maritime jurisdiction was created in the first instance," this inconsistency is particularly inappropriate in the admiralty context (*id.* at 1034).

The inconsistencies in the interpretation of *Minturn* are pervasive. As the district court noted, Pet. App. A11-A12, A29-A31, the Second Circuit remains committed to the view that, under *Minturn*, agency agreements are excluded from admiralty jurisdiction. Although the Second Circuit has stated that it would "welcome" *Minturn*'s overruling (*Peralta*, 739 F.2d at 804), it has rejected a variety of distinctions that limit the impact of *Minturn* in other circuits, noting that "such hair-splitting distinctions would blur, if not obliterate, a rather clear admiralty demarcation" (*ibid.*).

The Fifth Circuit has taken a diametrically different approach, refusing to recognize any general rule excluding agency agreements from admiralty jurisdiction. In *Hadjipateras* v. *Pacifica, S.A.*, 290 F.2d 697, 703 (1961), the Fifth Circuit held that an action for breach of an agency contract for the management and operation of a vessel is within the admiralty jurisdiction, since "the contract is everything classically known as a martime contract. It concerns a ship. It relates not only to a ship; its very purpose is to effectuate the physical, economic operation and employment of a vessel." In so holding, the court observed that *Minturn* presumably forecloses admiralty jurisdiction over an action for "an accounting as such" (290 F.2d at 704 & n.15, noting "doubts * * *

cast" on this restriction by cases such as *Archawski* v. *Hanioti*, *supra*).

Similarly, the Ninth Circuit, in *Hinkins Steamship Agency* v. *Freighters, Inc.*, 498 F.2d 411, 412 (1974), questioned *Minturn's* continued vitality, and found the agency agreement at issue there to be a maritime contract. The Ninth Circuit emphasized that although the husbanding agent had "*procured* [maritime services] and did not perform them directly, * * * [the fact that] their performance was its direct responsibility, that the services were clearly maritime and necessary for the continuing voyage, and that [the agent] was directly engaged in supervision, makes [the service] maritime and the contract sued upon a maritime contract"—particularly since the agreement was limited to a specific voyage and "there was repeated attendance on board the vessel" by the agent. *Id.* at 412.

The circuits, therefore, are clearly in disagreement about the application of *Minturn* and the continued vitality of its holding. While some courts have strained to reconcile the disparate holdings, see *E.S. Binnings, Inc.* v. *M/V Saudi Riyadh*, 815 F.2d 660, 664 (11th Cir. 1987), the decisions appear in large measure to be irreconcilable. For instance, the Second Circuit in *Admiralty Oriental Line* v. *Atlantic Gulf & Oriental S.S. Co.*, *supra*, ruled that a "managing operator" agency contract was not within admiralty jurisdiction, but the Ninth Circuit in *Hinkins* reached a contrary result, precisely because the contract before it provided for direct management services. See *Peralta*, 739 F.2d at 804.

In addition, the circuits are at odds over whether the status of "special agent" removes the bar of the

Minturn rule.[13] In *Hinkins*, the agent had responsibility for only a specific voyage, and thus no long-term relationship with the owner. The Ninth Circuit found that admiralty jurisdiction could be invoked, presumably since the duties involved were those most usually carried out by a special agent, rather than a general agent. Similarly, in *Ameejee Valleejee Sons* v. *M/V Victoria U.*, 661 F.2d 310, 312 (4th Cir. 1981), the court stated that while a general agent cannot invoke admiralty jurisdiction, a special agent can. The court found it difficult to formulate a test for general agency, however, and observed that the Federal Maritime Lien Act had "somewhat impaired if not eliminated" the rule that the enforcement of contracts by general agents falls outside admiralty's jurisdiction. See also *Compagnia Maritima La Empresa, S.A.* v. *Pickard*, 320 F.2d 829 (5th Cir. 1963) (appearing to distinguish a general agent from a special agent); *The Eurana*, 1 F.2d 684, 685 (3d Cir. 1924) (suggesting that a lien would be available to a special agent, but not to a general agent). On the other hand, the Second Circuit, in *Peralta* (739 F.2d at 803-804), refused to "subdivid[e] the category of general agency contracts based on the degree of importance of the services rendered by the agent or on the extent of supervision of performance," and criticized the *Hinkins* distinction between general and special agency agreements (739 F.2d at 803 n.4). Accord *Continental Cameras Co.* v. *FOA & Son Corp.*, 658 F. Supp. 287, 289

[13] "A special agency properly exists, when there is a delegation of authority to do a single act; a general agency properly exists where there is a delegation to do all acts acts connected with a particular trade, business, or employment." J. Story, *Commentaries On The Law Of Agency* § 17 (9th ed. 1982).

(S.D.N.Y.), aff'd, 831 F.2d 45 (2d Cir. 1987); Pet. App. A13-A16.[14]

Minturn warrants reconsideration not only because of the confusion concerning its scope, but also in light of the trend during the past century and a half to eliminate archaic restrictions on admiralty jurisdiction. Both Congress and this Court have participated in the process of rationalization. Congress has enacted a series of liberalizing statutes beginning in 1884,[15] and this Court has repeatedly overturned ear-

[14] The Second Circuit has cited *Hinkins* with approval, however, in concluding that "[t]he preparation and processing of export declarations, delivery orders, dock receipts, bills of lading and advance notification of shipment are not services rendered preliminary to a voyage[,] rather they are essential to it," and that, accordingly, a freight forwarder who carries out these functions may sue in admiralty. *Ingersoll Milling Mach. Co.* v. *M/V Bodena*, 829 F.2d 293, 302-303, cert. denied, 484 U.S. 1042 (1987).

[15] In *Detroit Trust Co.* v. *The Barlum*, 293 U.S. at 43-44, this Court recognized that Congress has the power to define the precise scope of the constitutional grant of admiralty jurisdiction to the federal courts, even if that definition expands the limits of that jurisdiction, so long as the grant remains within the purposes and general understanding of the concept. Congress has acted on that authority. See, *e.g.*, Act of June 26, 1884, ch. 121, § 18, 23 Stat. 57-58, as interpreted by the Court in *Richardson* v. *Harmon*, 222 U.S. 96, 101-102 (1911) (extending admiralty jurisdiction to include damages by a vessel to a land structure); the Federal Maritime Lien Act of 1910, ch. 373, 36 Stat. 604, and the Act of June 5, 1920, ch. 250, 41 Stat. 1005 (permitting a person providing necessaries for a vessel on the order of the owner to assert a maritime lien on the vessel, and to bring a civil action in rem to enforce the lien, without proving that credit was given to the vessel); the Death on the High Seas Act of 1920, ch. 111, 41 Stat. 537 (giving admiralty jurisdiction over suits for damages for death caused by a wrongful act on the high seas); the Merchant Marine Act of 1920, ch. 250, 41 Stat. 1007 (incorporating into the maritime law rules drawn from the Federal Employers Liability Act); the Longshoremen's and Harbor Workers' Compensation Act of 1927, ch. 509, 44 Stat. 1424; the Admiralty Jurisdiction Extension Act of 1948, ch. 526, 62 Stat. 496 (extending admiralty jurisdiction to damages to person or property on land caused by vessel on navigable water); Act of Nov. 23, 1988, Pub. L. No. 100-711, 102 Stat. 4735 (revising ship mortgage and lien laws to simplify administration of those laws, "to make [them] less cumbersome for the maritime community, and to make [them] more understandable for everyone involved." H.R. Rep. No. 918, 100th Cong., 2d Sess. 1 (1988)).

lier doctrines that are inconsistent with the principle that admiralty jurisdiction extends generally to transactions "related to ships and vessels, masters and mariners as agents of commerce" *Kossick* v. *United Fruit Co.*, 365 U.S. at 736.[16] See *United States* v. *Reliable Transfer Co.*, 421 U.S. at 409 (noting that "Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law.").

Minturn is just such a relic of archaic doctrine. Whether or not a contract is to be considered maritime, and thus within the admiralty jurisdiction of the federal courts, should not turn simply on whether or not the contract is one of agency. Indeed, the conclusion that general agency contracts are not within

[16] *E.g.*, *The Propeller Genesee Chief*, 53 U.S. (12 How.) 443 (1851) (rejecting tidewater doctrine); *Insurance Co.* v. *Dunham*, 78 U.S. (11 Wall.) 1 (1870) (constitutional grant of admiralty jurisdiction not limited by restrictive English precedents); *Archawski* v. *Hanioti*, 350 U.S. at 536 (admiralty jurisdiction extends to quasi-contract claim for unjust enrichment, "even where the libel reads like *indebitatus assumpsit* at common law"). Cf. *Executive Jet Aviation, Inc.* v. *City of Cleveland*, 409 U.S. 249, 268 (1972) (no admiralty jurisdiction where tort had no "significant relationship to traditional maritime activity").

admiralty jurisdiction appears inconsistent with the broad terms of the Federal Maritime Lien Act, which provides (46 U.S.C. 31342):

> [a] person providing necessaries to a vessel * * * (1) has a maritime lien on the vessel; (2) may bring a civil action in rem to enforce the lien; and (3) is not required to allege or prove in the action that credit was given to the vessel.

The district court rejected the applicability of the Federal Maritime Lien Act on the ground that it did not extend the bounds of admiralty jurisdiction (Pet. App. A26-A28). It seems equally appropriate to conclude, however, that the Act reflects the current view of the scope of admiralty, and that *Minturn* is simply an outmoded reflection of an earlier, more limited view of that jurisdiction.

Nor do we believe that any settled expectations require adherence to *Minturn*. In the first place, even assuming universal agreement on the meaning of that decision, it is hard to see precisely what justified reliance interests will be undermined if *Minturn* is overruled. Second, and more important, there is no such universal agreement, and thus continuance of the *Minturn* precedent can only lead to uncertainty in some instances, and forum shopping in others.

II. THE PRESENT CASE FALLS WITHIN THE ADMIRALTY JURISDICTION OF THE DISTRICT COURT

If, as we suggest, the Court determines that *Minturn* should be overruled and that agency agreements are not per se excluded from the scope of admiralty jurisdiction, the question will remain whether particular agency agreements fall within that jurisdiction. As the district court noted (Pet. App. A16-

A17), some contracts are sufficiently remote from maritime commerce, and so much a part of regular domestic commerce, that they are regarded as "preliminary" and beyond the reach of admiralty jurisdiction. A contract to sell timber to a shipbuilder, for example, is well-removed from the affairs of maritime commerce. Cf. *The Thames*, 10 F. 848 (S.D.N.Y. 1881) (broker who procured a charter party has no lien on a vessel); note 3, *supra*.

In the present case, the district court regarded the *Minturn* rule as a subset of the rule excluding preliminary contracts from the scope of admiralty. Pet. App. A16-A17. It therefore might be appropriate, once that ground of decision has been rejected, to remand the case for determination of the question whether this particular agency contract is "preliminary" in nature.

But in our view, no such remand is required on the facts presented. The marine fuel supplied to the ship was clearly "necessary" to the ship's operation.[17] Moreover, petitioner did not simply arrange for the sale of fuel by Arabian Marine to Waterman; rather, petitioner paid Arabian Marine for the fuel and seeks reimbursement for that payment here.[18] Thus, what-

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[17] Cf. the Federal Martime Lien Act, 46 U.S.C. 31342, p. 24, *supra*, which provides for a maritime lien for a person supplying "necessaries" to a vessel. The term "necessaries" includes "supplies which are necessary to keep the ship going." *Dampskibsselskabet* v. *Signal Oil & Gas Co.*, 310 U.S. 268, 280 (1940) (fuel oil); *Tramp Oil & Marine Ltd.* v. *M/V Mermaid I*, 630 F. Supp. 630, 632 (D.P.R.), aff'd, 805 F.2d 42, 44 (1st Cir. 1986) (same).

[18] Even before the enactment of the Federal Maritime Lien Act, an action to recover money owed for the supply of fuel to a vessel in a foreign port would have been deemed within admiralty's jurisdiction. See, *e.g.*, Supreme Court Rule 12,

ever the limits of admiralty jurisdiction with respect to agency agreements, those limits are not approached in this case.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

DAVID L. SHAPIRO
Deputy Solicitor General

HARRIET S. SHAPIRO
Assistant to the Solicitor General

ROBERT S. GREENSPAN
RICHARD A. OLDERMAN
Attorneys

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80 U.S. (13 Wall.) xiv (1872); *The J.E. Rumbell*, 148 U.S. 1, 12 (1893); J. Moore & A. Palaez, *Moore's Federal Practice* ¶ .230 [4.-5], at 2853, (citing *Martran S.S. Co.* v. *Aegean Tankers Ltd.*, 170 F. Supp. 477, 479 (S.D.N.Y. 1959)). Cf. S. Friedell, *Benedict on Admiralty* § 36 (7th ed. 1989) ("In the older codes of Continental Europe, the concept of [the materialman's lien] existed although it was not definitely defined. Under this law, the lien was given unqualifiedly to the furnisher of necessaries, and it made no difference who he was, or where or how the necessaries were obtained.").

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